IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 345

UNITED STATES OF AMERICA,

Appellant,

—v.—

DONALD FREED and SHIRLEY JEAN SUTHERLAND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

INDEX

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 4846-CD

THE UNITED STATES

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND

DOCKET ENTRIES

DATE	PROCEEDINGS
10/15/69	Ent ord for fig Indict & fxg bail at $25,000.00 Personal Surety with 10% ($2,500.00 Cash) Cash Deposit as to deft Freed & at $15,000.00 as to deft Sutherland. Fld Indict. Md. JS-2 (S for CC).
	Fld $25,000.00 Personal Surety with $2,500.00 Cash Deposit Bond posted 10/3/69 bef U. S. Commr. Venetta S. Tassopulos at L.A., Calif. Fld Not of Flg Bond as to deft Donald Freed.
	Fld $15,000.00 NACIC Bond posted 10/2/69 bef U. S. Commr. Venetta S. Tassopulos at L.A., Calif. Fld Not of Flg Bond as to deft Shirley Jean Sutherland.
11/ 3/69	Ct appts Robt. S. White as cnsl for deft Freed. Fld appear prae as to Luke McKissack for deft Sutherland. Fld waiver of deft Sutherland's presence. Deft Freed not appearg, ord A/P cont to 11/24/69, 9:00 am as to both defts. (CC)
11/24/69	Defts both pres with cnsl. Atty Frank Pestana appears for Atty Hugh Mannis. Atty Alan Saltzman appears for atty Luke McKissack. On mot both defts, Ord case cont to 12/1/69, 9 am for A/P. (CC)

DOCKET ENTRIES

DATE	PROCEEDINGS
12/ 1/69	Both defts & cnsl present. Defts Freed & Sutherland plead Not Guilty to both counts as chgd. Court ords case as to both defts assigned to the cal of Judge Ferguson at 1:30 PM this date for all fur procs. (CC)
12/ 1/69	Ent procs, Ct ords Jury Trial set for 2/24/70, 10 am. Fld waiver of deft Freed's presence. Fld des of cnsl & Appear prae of atty Hugh Manes for deft Freed. Ct ords hv to 1/12/70 to file any mots & govt hv to 2/2/70, to respond & hrg on mots set for 2/9/70, 11 AM (F)
12/ 9/69	Fld Mot & Not of Mot of deft Freed retnble 12/12/69, 1:30 PM bef (F) for reduction of bail, affid of Hugh R. Manes & Memo of pts & auths in suppt.
12/11/69	Fld Pltf's oppos to deft Freed's Mot for reduction of bail and affid of Henry J. Novak, Jr. in suppt thereof; with affid.
12/12/69	Ent prcdgs, after argument, Court ords deft Freed's motn for reduction of bond denied. (F)
1/12/70	Fld Mot of both defts Freed & Sutherland for Bill of Particulars and supporting Memo of pts & auths retnble 2/9/70, 11 AM bef (F).
	Fld Mot of both defts Freed & Sutherland for Discovery and supporting Memo of pts & auths purs Rule 16 FRCP retnble 2/9/70, 11 AM bef (F).
	Fld Mot of deft Freed to suppress evidence illegally seized and Memo of Law in suppt thereof retnble 2/9/70, 11 AM bef (F).
	Fld affif of deft Freed in suppt of Mot to suppress evidence, with exbt "A" attached thereto.

DOCKET ENTRIES

DATE	PROCEEDINGS
1/13/70	Fld defts' Notc of Mot to dism, suppr evid, discvy & for bill of partics, retnbl 2/9/70, 11 am bef (F). Fld defts' Mot to dismiss; fld memo in suppt thereof.
	Fld defts' Mot to suppress and return items seized to their rightful owner; memo of pts & auths & affid & suppl effid in suppt.
2/ 2/70	Fld Mot for extension of time for filing response to pre-trial mots. & ord (WF) thereon, giving pltf until Fri., 2/6/70, to file response to defts' pre-trial mots.
2/ 2/70	Fld pltf's oppos to defts' mots to dismiss indict.
2/ 4/70	Fld pltf's oppos to mot to suppress with 2 affids in suppt thereof.
2/ 6/70	Fld Pltf's response and opposition to Mot for Discovery and inspection.
	Fld Pltf's Combined Bill of Particulars and oppos to defts' Mot for Bill of Particulars purs to 7(f) FRCP.
2/ 9/70	Ent procs, Ct ords hrg on deft's Mots cont to 2/16/70, 11 am for hrg (F)
2/12/70	Fld deft's reply memo in suppt of mot to dismiss.
2/16/70	Ent procs hrg deft's mot for Bill of Partics, for discvy & to dism, to suppr evid & for retn of seized property & Ent ord grantg mot dism indict as to both defts. Atty Manes to prepare formal order of dismissal Ent ord cont to 2/27/70, 1:30 pm for presentation of ord for dism. (F)
2/27/70	Fld Ex Parte Mot for continuance of hearing & Ord (HP) cont hrg to 3/6/70, 1:30 PM as to both defts. (HP for F).

DOCKET ENTRIES

DATE	PROCEEDINGS
3/ 6/70	Ent procs hrg re ord of dismissal. Cnsl deft's present proposed ord of dismissal to the Ct & Ct ords matter submitted. (HP for F)
3/ 9/70	Fld Pltf's Supplemental Memo of fact.
3/10/70	Fld Order (F) dismissing Indictment as to both defts Donald Freed & Shirley Jean Sutherland. Ent. 3/10/70. Md JS-3 as to both defts. (F).
4/ 7/70	Fld pltf's Notice of Appeal & issd cys to defts' cnsl, U.S. Atty, (F), jury clerk, file. Flg fee waived. Notice of Appeal re dismissal of case against both defts Freed & Sutherland, ent 3/10/70.

[Filed Oct. 16, 1969]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
September 1969 Grand Jury

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

INDICTMENT

[18 U.S.C. § 371: Conspiracy; 26 U.S.C. §5861(d): Possession of Unregistered Destructive Device; 18 U.S.C. § 2: Aiding and Abetting]

The Grand Jury charges:

COUNT ONE
[18 U.S.C. § 371]

Commencing on or about October 1, 1969, and continuing until the date of the filing of this indictment, in the Central District of California, defendants DONALD FREED and SHIRLEY JEAN SUTHERLAND, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons whose names are unknown to the Grand Jury, to commit an offense against the United States, that is, to possess destructive devices, to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841(c), Title 26, United States Code, in violation of Section 5861(d), Title 26, United States Code.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED held a conversation with an undercover officer of the Los Angeles Police Department at John Brown Bookstore, 13526½ Van Nuys Blvd., Pacoima, California.

2. On or about October 1, 1969, in the Central District of California; defendant DONALD FREED placed a telephone call from a phone booth in Pacoima, California, to the defendant SHIRLEY JEAN SUTHERLAND.

3. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED gave the heretofore mentioned undercover officer of the Los Angeles Police Department a phone number at which defendant DONALD FREED told him to call defendant SHIRLEY JEAN SUTHERLAND.

4. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

5. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a second telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a phone booth in Beverly Hills, California.

6. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

7. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from his apartment at 1825 Beloit Street, West Los Angeles, California.

8. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHER-

LAND placed and caused to be placed one hundred dollars ($100) in the mail box at her residence, 1144 Tower Road, Beverly Hills, California, in payment for a number of destructive devices, to wit: hand grenades.

9. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED tendered a one hundred dollar ($100) check in payment for a number of destructive devices, to wit: hand grenades.

10. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades.

COUNT TWO

[26 U.S.C. § 5861(d), 18 U.S.C. § 2]

On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades, which had not been registered to him with the Secretary of the Treasury or his delegate as required by Section 5841(e), Title 26, United States Code.

At said time and place, defendant SHIRLEY JEAN SUTHERLAND aided, abetted, counseled, induced, and procured the commission of the offense alleged above.

WM. MATTHEW BYRNE, JR.

A TRUE BILL

_____

Foreman

_____

United States Attorney

[Filed Jan. 13, 1970]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

MOTION TO DISMISS INDICTMENT

Defendants, DONALD FREED and SHIRLEY JEAN SUTHERLAND, through their attorneys, LUKE McKISSACK and HUGH R. MANES, move the Court pursuant to Rule 12(6) Federal Rules of Criminal Procedure, for an Order dismissing the Indictment on the following grounds:

(a) The Court has no jurisdiction of the offenses charged in either count of the Indictment for the reason that Sections 5841(c) and 5861(d), Title 26, United States Code, and each of them on their face and as construed by the indictment herein are unconstitutional and deprive the defendants of due process of law guaranteed by the Fifth Amendment to the United States Constitution;

(b) The Court has no jurisdiction of the offenses charged in either Count of the Indictment for the reason that Sections 5841(c) and 5861(d), Title 26, United States Code compel defendants to incriminate themselves contrary to the guarantees of the Fifth Amendment to the United States Constitution;

(c) The Court has no jurisdiction of the offenses charged in either count of the Indictment for the reason that the statutes charged therein on their face and as construed by the Indictment herein are vague, indefinite, ambigious and uncertain, and deprive defendants of due

process of law guaranteed by the Fifth Amendment to the United States Constitution;

(d) The Indictment and each count thereof fail to state a public offense and is vague, indefinite, uncertain and ambigious, in that it and each count thereof fails to state each essential of the offense alleged and deprives defendants of due process of law guaranteed by the Fifth Amendment and a fair trial guaranteed by the Sixth Amendment.

DATED: January 12, 1970.

HUGH R. MANES
Attorney for Defendant,
Donald Freed
LUKE MCKISSACK
Attorney for Defendant,
Shirley Jean Sutherland

By /s/ Martha Goldin
MARTHA GOLDIN
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

Transcript of proceedings before the Hon. Warren J. Ferguson on Monday, February 16, 1970, commencing at 10:00 A.M.

APPEARANCES:

For the Plaintiff:

WM. MATTHEW BYREN, JR.
United States Attorney

By: DENNIS KINNAIRD
Assistant United States Attorney

For the Defendant Freed:

HUGH MANES, ESQ.
3440 Wilshire Boulevard
Los Angeles, California

For the Defendant Sutherland:

LUKE MCKISSACK, ESQ.
1725 Ivar
Los Angeles, California

LOS ANGELES, CALIFORNIA, MONDAY,
FEBRUARY 16, 1970, 2:00 P.M.

• • • •

THE CLERK: No. 10 on the calendar, case No. 4846-Criminal, United States of America versus Donald Freed and Shirley Jean Sutherland, hearing defendants' motions.

MR. KINNAIRD: Dennis Kinnaird for the Government, your Honor.

MR. MANES: Hugh Manes for the defendant Freed.

MR. McKISSACK: Luke McKissack for the defendant Sutherland, your Honor.

• • • •

THE CLERK: No. 4846-Criminal, United States of America versus Donald Freed and Shirley Jean Sutherland.

THE COURT: I will hear from Mr. Manes.

MR. MANES: May it please the Court, on the motion to dismiss, if the Court please, I would like to address myself to that somewhat briefly as the first item of business.

This motion, your Honor, is directed essentially to two aspects of the Indictment which charges in Count One a conspiracy and Count Two possession of ten hand grenades in violation of the registration requirements of the Weapons Control Act of 1968.

Of course a great deal of our argument has been made already in the Hanes case, your Honor, and as we have tried to point out in our memorandum—

THE COURT: What are you going to do about the cases that say that fingerprints and photographs do not come within the purview of self-incrimination.

MR. MANES: Well, more than fingerprints and photographs are required here, your Honor.

THE COURT: What about the cases that say an address is not—

MR. MANES: But the most essential thing, your Honor, that we are faced with here—

THE COURT: I would like you to address yourself to the Court's question.

MR. MANES: Well, that is what I am doing, I am doing that.

THE COURT: All right.

MR. MANES: I am saying that the information conveyed to the transferor by the transferee indicates that the transferee is going to be in possession of some weapons in violation of 2301 to 03 of the—

THE COURT: Yes, but the transferee doesn't have to do that. The transferor can look in the phone book and get his name and address.

MR. MANES: But the information is going to be in the national registry. And the information in the national registry which authorizes a transfer from the transferor to the transferee is going to indicate that such a possession on the part of the transferee is in violation of State law of California.

And so the combination of fingerprints, address and photographs and other information—and incidentally I might point out that the regulations themselves require more than simply that information, your Honor. They also require an affidavit.

If I may, your Honor, allude for the moment to 26 CFR, Section 178.98, it would appear that the Secretary has required that sales or delivery by a licensee of destructive devices to a non-licensee is prohibited unless such person—and I presume the Secretary means the non-licensee—furnishes an affidavit setting forth reasonable—

THE COURT: You mean 179.98.

MR. MANES: I beg your pardon?

THE COURT: You mean 179.98.

MR. MANES: No, your Honor. I meant 178.9, according to my notes.

THE COURT: All right.

MR. MANES: There is a 179.98 also which makes reference. But the one I mean, the one I am reading appears to be an affidavit required to be presented by the non-licensee setting forth the necessity for his acquisition of the weapon, and that possession would be consistent with public safety. It doesn't obviate the requirement of the transfer being approved, but it just supplements it.

Of course I think that the main point here, your Honor, is that by whatever means the information is conveyed through the transferor, the fact that the transferee's name will appear on the register will immediately subject the transferee to State prosecution in California under 123.23 of the Penal Code—12303 of the Penal Code.

And as I see the case here, in light of Hanes, the only difference really between this and the Hanes case is that here, instead of the transferor—or rather the transferee being the registering party it is the transferor. But in essence he is providing the requisite information for prosecution, for the Government.

THE COURT: How does that violate the transferor's self-incrimination?

MR. MANES: Because it is information—

THE COURT: When it was somebody else who furnished the information.

MR. MANES: Because the transferor is acting as agent of the Government in this sense. And [illegible] the transferee is conveying information to the tran[illegible] he is, in effect, giving the Government—through its agent—namely the transferor, information to make it possible for him to be prosecuted under the law. As a matter of fact they are even providing the Government with a ready-made witness because they are making him a party to the transfer, who will then become the Government's witness to the transaction.

So I really—I find it difficult, your Honor, to escape the implications of Hanes, just simply because they have set up an intermediary or a conduit for the transfer of this information. Otherwise you have the exact same statute that you have in Hanes.

I don't know that we can add much more to the points which we have set out in our memorandum. But I think that there is one other argument in this case, and that is tied into the knowledge argument that we make in another part of our memorandum. And here of course we find an indictment which, with the statute, fails to make an allegation of knowledgeable possession.

Now, I know that the thought is how can one who has possession of a submachine gun or grenade, or some other weapon, not know that he has got a weapon in his possession. But let me suggest to your Honor the facts of a hypothetical case which very closely approximates this one, where an accused received from a Government agent a box which, unbeknownst to him, contains unregistered weapons. And these are placed in his possession.

And then within a minute following that transfer he is arrested for possession of these weapons. They are in the box. They are in his possession. But there is no showing that he had any information verbally from the Government agent, or from anyone else, that that is what the box contained.

There is no evidence that he—at least on the face of the indictment—that he had any knowledge that the box contained contraband of some kind.

I have to say, your Honor, that I would find it offensive to due process if the Government could prosecute such a defendant successfully, certainly in the absence of being required to prove that the defendant knew that he was in possession, not of information, but in possession of grenades or other destructive devices which did not meet the registration requirements of the law.

And there is another reason for this feeling that it would be offensive to due process not to require the Government to prove it, and that is the fact that here—

THE COURT: Can you find me a case that says that, a tax case?

MR. MANES: No, I cannot find your Honor a tax that does.

THE COURT: Only common-law cases that provide—

MR. MANES: I think we have cited to your Honor some other cases, such as the Lambert case. And we have tried to draw an analogy to the Dennis case as examples of the types of cases. I realize that Dennis is a First Amendment case but I don't think that answers the problem of due process necessarily, to say that, oh, well, that is a First Amendment problem.

But I did want to point out, your Honor, that what makes me, what compounds the difficulty here, and what makes it more offensive to due process is this fact, namely, that you have a Government agent, an undercover officer, but nevertheless he obtained the grenades from a Navy arsenal. They are turned over to him by Naval Intelligence.

Now the Government of course is exempt from the registration requirements of the Act until they make a transfer. And when the Government makes a transfer

it is, there is a requirement that they get the approval of the Secretary.

Now, we are told that no such approval was obtained and so we are in the posture therefore of having the Government prosecute the defendant for receipt of weapons which the Government was under a duty to have registered before that transfer was effectuated.

So what you have is an analogy to the kind of due process contentions that are made, you have an analogy to the kind of due process arguments that are given in support of the exclusionary rules in Matt versus Ohio, or in cases such as Richmond versus Rogers, and in other types of situations where the Court refused to have a part of the "dirty business."

THE COURT: Well, in order to establish that we have to have a trial.

MR. MANES: Well, not necessarily.

THE COURT: You are basing your motion to dismiss the indictment without any facts.

MR. MANES: No, not quite, your Honor, because we do have some response made to our bill of particulars.

The Government has informed us, in response to the bill of particulars, which enlarges but nevertheless becomes a part of the indictment, they have informed us that Mr. Jarrett, the police officer for the Los Angeles Police Department received the weapons, that he received the weapons from the Naval Intelligence office. We know that much.

And we know from the bill of particulars and the response thereto that he, in turn, transferred these weapons to the defendant, the defendant Freed. And that becomes the essence of both of the counts in this case. We know that much.

So therefore if in the allegations of the indictment we find that these weapons are unregistered, then we know that the Government failed in its duty to have them registered before the transfer, and that there is a prima facie case of entrapment, because it simply means that the Government can create the deficiency, that is the failure to comply with the law. The Government, simply by failing to register its weapons before the transfer creates

a situation where the defendant can be, and is not only violating the law, the registration requirements because of the act of the Government, the unlawful act of the Government, but indeed that he does so knowingly, according to the indictment.

I think that in the context of those circumstances, your Honor, it makes an indictment here fatally defective. It seems to me that, certainly in the absence of requirement that it be shown that these defendants at least had notice that he was obtaining a weapon that was being transferred in violation of the Weapons Control Law.

Those are basically the two contentions I want to make.

THE COURT: Mr. Kinnaird?

MR. KINNAIRD: May it please the Court:

On the last question that was raised, the question of entrapment, or the legality of the Government's activity in the prior transfers, we take the position that up to the point of the transfer to Mr. Freed this was a control possession. And the question of entrapment becomes a question of fact, whether or not the Government merely provided a willing seller to a willing and able buyer.

And we believe that when it comes to the merits of the case we will be able to prove beyond a reasonable doubt, as it is our burden, that Mr. Freed was a completely willing buyer and was not entrapped in any sense of the law. We were just providing the—

THE COURT: Well, isn't it true under the law—you are saying that all of the time the grenades were delivered to Mr. Freed that they were in the possession of the Government.

MR. KINNAIRD: Yes, your Honor.

THE COURT: Does the Government, before it can transfer these grenades to somebody, have to get the approval of the Secretary of the Treasury?

MR. KINNAIRD: There is a procedural requirement for an exempted transfer. In this case it is no different, your Honor, than the order form in a narcotic situation where the Government goes out and buys narcotics from a willing buyer not pursuant to the order form. It is the exact situation which you have in both the Minor and Huie case where it was the Government's agent's

obligation to have that order form, to give that order form to protect the seller. The Courts have formerly held that the defendant could be found guilty and could be convicted for the Government's failure to comply with it, not even tendering the order form to him.

THE COURT: But my question is, this is the reverse situation. What if a Government agent sells heroin without all the necessary requirements?

MR. KINNAIRD: If it is a controlled sale, your Honor, and the purpose of the question of law enforcement that we have, your man is not going to be covered from it because a policeman acting in the line of duty, the same as if he was shooting somebody or any other activity is not—

THE COURT: He is not breaking the law then. But in this case he is deliberately breaking the law. If he sells heroin to me—if a Government agent sells heroin to me without complying with the necessary requirements of sale, he has violated the law deliberately.

You are saying that just because he is a police officer he is exempt.

MR. KINNAIRD: If he is acting in the line of duty and was instructed to act, to find out if X wanted to buy heroin and was soliciting the buy of heroin and he decides to give him the opportunity—

THE COURT: Can you show me any kind of a case that permits that?

MR. KINNAIRD: That permits the sale where you have had a situation of sale of an item by the Government?

THE COURT: That says merely because he is acting as a law enforcement officer that that exempts him.

MR. KINNAIRD: And he is acting pursuant, or acting under the authority of a law enforcement officer?

THE COURT: Yes.

MR. KINNAIRD: Well, you have to, you have the exact same situation when you have a narcotic situation because there is a requirement on the buyer and seller both to act.

THE COURT: I am not talking about a buyer. I am talking about a sale.

MR. KINNAIRD: Well, why would the sale, the mere fact of a sale make it entrapment, the total concept of entrapment, the illegality of the police officer, because the question is: whether you are complying—

THE COURT: You are saying then, you are saying then that the transfer to Freed by the Government, the Government did not violate the law because they were acting as the Government?

MR. KINNAIRD: That is correct, your Honor.

THE COURT: All right.

MR. KINNAIRD: And we are acting as the Government in our capacity—

THE COURT: Except when another branch of the Government says you can't do it unless you get my approval.

MR. KINNAIRD: Well, in that sense what they were controlling on the legislative basis of the statute—this point was not per se raised by them, your Honor, in this motion. If your Honor would like the point briefed I would like to do this.

THE COURT: I think it is inherent. I sensed it when I read the briefs.

MR. KINNAIRD: Well, basically, your Honor, the point I—

THE COURT: Let me ask you this question. Let's assume I am walking back from lunch, and let's assume I find in the gutter a hand grenade, and let's assume I picked it up for the purpose of taking it over to the police station to have it destroyed. Do you get the factual situation?

MR. KINNAIRD: Yes, your Honor.

THE COURT: And let's assume that I know I have possession of it because I picked it up.

MR. KINNAIRD: Yes, sir.

THE COURT: And let's assume I knew this was a hand grenade because I could see it. Am I guilty under the statute?

MR. KINNAIRD: I don't believe that your Honor would be.

THE COURT: Why?

MR. KINNAIRD: For the same reason.

THE COURT: Because there wasn't the necessary scienter involved, right?

MR. KINNAIRD: No, your Honor. I don't address myself to scienter. I address myself to public necessity and countervailing public interest that would make an extension of the statute to that point—

THE COURT: Well, let's assume—

MR. KINNAIRD: —which would make it incredible, I would, it would make it unconstitutional to extend the statute to the point where an individual acting scienter of the community by taking a hand grenade and putting it in, the same as picking up a sawed-off shotgun and going in a bank—

THE COURT: Well, we are talking about scienter now, aren't we? A scienter is, you know, bad motive, a bad man.

MR. KINNAIRD: Basically we are talking about illegal—right, the illegal—

THE COURT: Isn't that scienter?

MR. KINNAIRD: Right.

THE COURT: The criminal mind.

MR. KINNAIRD: Yes, your Honor. The state of mind to violate the law.

THE COURT: All right. All right. So you are saying, what you are saying then is a necessary element of the crime for which these defendants are being charged is scienter.

MR. KINNAIRD: No, I am not, your Honor. I am saying that if the statute could be extended to apply to your Honor's hypothetical it would be stretching the statute out basically—

THE COURT: What does the statute say? The statute says anybody who possesses a hand grenade that has not been registered is guilty of a crime for which the penalty is ten years or $10,000.00 or both.

MR. KINNAIRD: Yes, your Honor.

THE COURT: All right. I am walking down the street, I pick up a grenade, I know it is a grenade and I know it isn't registered. Under the statute—

MR. KINNAIRD: Under the statute you would probably technically be guilty under the statute.

THE COURT: You say that is wrong.

MR. KINNAIRD: Having in possession, with no transfer form attached to it, to pick it up.

THE COURT: Sure.

MR. KINNAIRD: And the reason you would be guilty of it would be the affirmative duty you have not to take possession of a firearm unless it is accompanied by the proper transfer.

THE COURT: So I would have to leave it there.

MR. KINNAIRD: You would have to leave it there.

THE COURT: If I picked it up I could go to prison for ten years.

MR. KINNAIRD: Or—I believe that your Honor could recognize the potential and would never bring that kind of case before the Court—

THE COURT: But you see, that is the law of men, rather than a law of law that we have abolished years ago, haven't we?

MR. KINNAIRD: Well, it reminds me, your Honor, of the quote that I used where they had the law that whoever draws blood on the streets of Ballona shall be severely punished, but the surgeon who is relieving a fit would not be the man subject to it.

THE COURT: Then it all boils down in the final analysis that in order to establish this crime a necessary element is scienter.

MR. KINNAIRD: I disagree that the statute, as the overwhelming case authority on the predecessor statute, and the entire concept of regulatory statutes, your Honor, make any requirement of scienter as being—I knowingly take possession contrary to law—the statement of "contrary to law."

Now I concede the fact, and as I did in my points and authorities, that the question that you must have knowledge that you are taking a destructive device in your possession is a necessary and logical extension and meaning of the term "possession"—that you know you have hand grenades period. That is what is required.

The question of scienter as they brought out in the Sikes case, and the predecessor statute 5851 which I am sure your Honor has sat on numerous appeals under that 5821, as in the Sikes case they took the position, yes, I

have the gun in my hand but I did not know that this weapon had a barrel less than sixteen inches long, and therefore I did not know it is a firearm, I did not know that it is contraband for me to posses it without registering it. And therefore I should not be found guilty.

The Court has consistently held that, in the case of the National Firearms Control Act, that was taxation legislation, that the knowledge that the weapon must be registered, the knowledge that the weapon is a device as defined by the statute, knowledge of the statute or even of the existence of the law is not a necessary element but is completely immaterial to the regulatory scheme, because if you had this possession in a regulatory scheme, that you must have knowledge that this is a weapon to be registered you would have a natural way out and every violation of it by a person who had not addressed themselves to the question of reading the regulations, the regulatory statutes.

THE COURT: All right.

MR. KINNAIRD: And I have one case in point, your Honor, that I feel is quite close to the theory of what we are talking about. Under Rule 10(b)(5) of the Securities and Exchange Act you can hold a person guilty of a crime which carries a certain penalty, if he has knowledge of the regulation it carries a more extreme penalty. But in both cases it carries a penalty to violate the regulations, under Rule 10(b)(5).

And it goes to the same point as the Courts have numerous times pointed out. The rule of scienter can play a number of different roles in our criminal enforcement. One in the common law, it is generally considered that it has to be there. The Morrisett case lays that out in great detail.

However, they too even recognize that it would be unfeasible to cope with a regulatory statutory scheme and require that the scienter requirement, that they did not dispense with this aspect of the case. And the cases that have followed have consistently held that scienter is not required, not a required element of it.

And so back to the original hypothetical, I changed my position, I recognize that under the statute it would be a

crime, but it is one of those situations that would have to be taken because I believe it is an extension beyond the concept that is necessary for your decision on this.

THE COURT: All right. Let's get back to the transfer by the Government agent.

Under a literal reading of the statute the agent was also guilty, wasn't he? The undercover agent? Because he transferred these hand grenades without obtaining the approval of the Secretary.

MR. KINNAIRD: The transfer was made without the, without obtaining the approval of the Secretary.

THE COURT: And he was guilty.

MR. KINNAIRD: There is a transfer of responsibility. We claim there is an exception based on the exigencies of the situation here, the time requirement, the lack of ability to get it, our duty to correct and arrest a crime as it happens, the fact that—

THE COURT: Are you saying then that—are you saying then that as a defense the transferee has a period of time in which to correct his mistake?

MR. KINNAIRD: No. There is no opportunity for the transferee under this statute—

THE COURT: You said that there wasn't time under this case—

MR. KINNAIRD: I am speaking—

THE COURT: —for the transferor to get permission.

MR. KINNAIRD: I am speaking—

THE COURT: Doesn't the right hand have just as much importance as the left? When the, if the transferor is not guilty if he has time to get permission, why wouldn't that same right pertain to the transferee?

MR. KINNAIRD: Because we have two different interests that we are concerned with, your Honor. And I would like to address myself to that—

THE COURT: The interest, the interest was the interest of transferring hand grenades without the approval of the Secretary of the Treasury. That is the interest involved.

MR. KINNAIRD: Well, the interest is—

THE COURT: Because this is a tax law, isn't it?

MR. KINNAIRD: It is an Internal Revenue Regulation, yes, tax law.

THE COURT: All right.

MR. KINNAIRD: I would like to point out somewhat an analogous situation. A policeman who is fulfilling a lawful duty of his that to-wit being to arrest a person in a criminal activity—

THE COURT: Because the law gives him that right.

MR. KINNAIRD: What provision in the law gives him the right?

THE COURT: The traffic code that says that this is not pertaining to police officers acting in an emergency.

MR. KINNAIRD: Well, if your Honor would like I would like to have the opportunity to brief this specific point in detail, because they did not raise this point. They raised a number of other points that I believe are totally without merit. I would like to have the opportunity to look into this point that your Honor has raised and to attempt to understand exactly—if you are saying that you have a—because if the policeman does not comply with the regulation, or the transferor does not comply with the regulation—

THE COURT: This is the issue—

MR. KINNAIRD: —ever be committed—

THE COURT: This is the issue, this is the issue: Does the Government have a right to punish somebody when the Government violates the law that causes that person to be punished? It is that simple.

Does the Government have the right to punish somebody as a result of the Government's illegal activities?

MR. KINNAIRD: Our position, your Honor, on this point turns on the concept that—

THE COURT: You can't convict somebody when an officer commits an unlawful search and seizure. You can't convict somebody if the officer obtains an involuntary confession.

So what is so sacred about this law in here when the Government voluntarily and with plan and thought violated the law. And now they seek to hold the transferee, they want to punish the transferee.

Does the Government have the right?

MR. KINNAIRD: I think the position that we take, your Honor, is that we are concerned here with a situation

of an individual, which we will be willing to prove at trial, was actually seeking to obtain hand grenades—

THE COURT: Why didn't you prosecute him under the State law? I was going to ask you that question eventually so I might as well ask now.

Why wasn't he prosecuted under State law?

MR. KINNAIRD: Well, your Honor—

THE COURT: This was an investigation that originated and was started by the Los Angeles Police Department.

MR. KINNAIRD: It was a joint investigation, your Honor.

THE COURT: You have got a law in California that prohibits his possession of the hand grenades.

MR. KINNAIRD: Yes, your Honor.

THE COURT: Why didn't you prosecute him under that? Why wasn't he prosecuted under that?

MR. KINNAIRD: I would have to admit, your Honor, that I don't know because I wasn't even involved in the case at that time. And until the motion came in I didn't even know what was going to be involved.

THE COURT: Under that case you have got something else again. You have got entirely different rules to go by.

MR. KINNAIRD: But the decision at some point—and the decision was certainly a great deal more than—I mean higher than my own, it was made that the case would be proceeded upon in Federal Court. And we sought an indictment and brought it here. I honestly can't answer why it was decided it would be brought here. I recognize it could be brought in State Court.

We both have a set of statutes regulating offenses of this nature.

THE COURT: Under the Government's statute it is not illegal to possess a hand grenade. It is illegal to possess a hand grenade that hasn't been registered, or you haven't obtained the approval of the Secretary of the Treasury. And that is a big difference.

MR. KINNAIRD: It is illegal, under the Government's position, to take possession of one that has not undergone these activities.

THE COURT: That is what I was saying maybe in a little different words.

MR. KINNAIRD: The only question in back of the basic equities which I understand your Honor is pointing out, we are confronted with a situation where we are faced with people who want to engage in the activity. We have an opportunity, because of the locale and infiltration of the given individual in an organization who can provide this, that has to be done in an extremely short period of time. It is his duty, and it is the duty of the agency with which he works to effectively foreclose any criminal activity on the part of people that he knows desire to do it.

Now the question then boils down to what is our agent, or the police officer on the scene, going to do at that time.

THE COURT: The police officer voluntarily went to the Navy, and the police officer voluntarily obtained from the Navy, and the police officer voluntarily handed over these hand grenades to Freed.

MR. KINNAIRD: But your Honor—

THE COURT: And you say that is all right, there is a great emergency happens—

MR. KINNAIRD: That is correct.

THE COURT: What happens to the great emergency is that they went and got them in the first place.

MR. KINNAIRD: Your Honor, if they don't sell them and he buys them from somebody else we will have no basic ability to ever prosecute him. All we are talking about is more effective police enforcement here. All we are talking about is an approach that indicates a more effective enforcement.

THE COURT: This is the old argument that was always made when we were talking about involuntary confession. This is the old argument that was always made on illegal search and seizure—it is going to interfere with more effective police enforcement.

MR. KINNAIRD: Yes, but—

THE COURT: And the Supreme Court years ago discarded that concept.

MR. KINNAIRD: Yes. But I think they were concerned with much different ideas than what we have today. They were basically concerned with the question of search—on the confession they were concerned with the basic—I think it has gone to the evolution of voluntary

and involuntary, it has gone into the concept of the Miranda warnings and the right to enlighten the unenlightened as to their rights under the Constitution.

The search and seizure laws are exclusionary rules predicated upon the concept of the sanctity of an individual, his privacy, and that the police will not take excessive behavior in invading that privacy. And therefore we will apply the current activity to this.

Those are two methods of controlling the police activity as it affects the given individual.

THE COURT: Isn't that the law of entrapment?

MR. KINNAIRD: Your Honor—

THE COURT: Isn't that the same concept, the law of entrapment?

MR. KINNAIRD: No, your Honor, I don't think so. There are two concepts involved in the law of entrapment and they both go down to the same basis.

The law of entrapment, you have an individual who says basically, I am not a person to have intended to commit this act. And if it had not been for the policeman who implanted the original seed of the activity to me I would not have committed this act.

THE COURT: We are talking about scienter.

MR. KINNAIRD: No, the act of taking hand grenades in this case, your Honor—only taking hand grenades, possession of hand grenades. And the question and the inherent nature of hand grenades give people notice that something is going to be beyond that which they claim to be required.

I would like the opportunity to, if your Honor is going to rule towards the entrapment question, to have an opportunity to brief this at greater length and come back and present an argument as to the numerous policy considerations that would be involved in making a situation that when you have an officer who sells the item, and that officer sells it without complying with the registration, that as a matter of law that constitutes entrapment and there can never be any prosecution, because that would be the impact, I believe, of your Honor's ruling.

THE COURT: No. That would be extremely falacious on my part if I so held.

I raised the issue on the basis of scienter because it all goes back to the final analysis, we are talking about scienter. I don't think that you can get away from it.

MR. KINNAIRD: Your Honor's position is then that—well, I think then that I should—is the scienter requirement—and I only ask this in all respect, your Honor, for my own edification on the point—is it one of knowledge of the law itself, or is it one of just a purpose that is contrary—

THE COURT: No, no, no. Everybody is presumed to know the law. And knowledge of the law I don't think is a necessary element.

But it appears to me that when you take the problems of this case, you take a police officer who goes to the Navy, who gets some hand grenades for the sole purpose of delivering those hand grenades to one of the defendants so that defendant can be arrested and charged with a federal crime. That is the whole purpose of the whole thing.

He didn't give them the hand grenades so they could blow up the City Hall, did he?

MR. KINNAIRD: Well—

THE COURT: Or maybe he did, I don't know.

MR. KINNAIRD: Well, inherent within this fact of the hand grenades, your Honor, is the question that there are not any legitimate uses for hand grenades.

THE COURT: The only reason he gave him the hand grenades was so that Freed could be arrested and charged with a federal offense.

MR. KINNAIRD: Or in a sense, your Honor, we only gave him what he wanted—

THE COURT: The opportunity—

MR. KINNAIRD: The opportunity to—

THE COURT: You didn't give him the hand grenades to do any damage with them, I hope?

MR. KINNAIRD: We certainly did not intend to let them remain that long—

THE COURT: All right, all right.

MR. KINNAIRD: —to do any damage, or to have them fed back.

THE COURT: All right.

MR. KINNAIRD: But the man did have the propensity to want to acquire them. There is no way of knowing if a person is acquiring weapons from underground sources or from a black market, the agent was certainly in a position there of selling himself as one who was able to acquire them, not from the office of Naval Intelligence at least, but you are dealing in a subrosa culture that was attempting to stockpile destructive devices and we merely gave him the opportunity, under a control situation, where we could minimize the danger to society and, we believe, bring the man to justice for the criminal activities that he desired to do. And that was the only point—

THE COURT: You desired to bring him to justice for the thing that he was planning to do, not for the purpose of what he did.

MR. KINNAIRD: He did, because he did take possession of the hand grenades. We gave him the opportunity to do it.

THE COURT: All right.

MR. KINNAIRD: And the other aspect of the charge is of course the conspiracy which is the plan to acquire the grenades.

THE COURT: Let me ask you this question: Let's assume that the—it is against the law in California to have these devices that they are charged with, the hand grenades, there is no question about that.

MR. KINNAIRD: That is correct, no question about that, your Honor.

THE COURT: All right. Now, in order to comply with federal law, in order to comply with the federal law that we are talking about here, it is necessary that there be an application.

MR. KINNAIRD: That is correct, your Honor.

THE COURT: All right. And two people have to—the application has to contain certain information. One is that the transferor has to agree to deliver, and the transferee has to agree to receive.

MR. KINNAIRD: The transferee does not have to—depending on what—

THE COURT: Well, he has to put his fingerprint on it, he has to put his fingerprint on it.

MR. KINNAIRD: Yes.

THE COURT: As soon as he puts his fingerprint on that application, hasn't he violated two sections of the California Penal Code? One is an attempt to obtain a destructive device, and the second is a conspiracy to obtain a destructive device?

MR. KINNAIRD: He probably has, yes, your Honor.

THE COURT: And then Hanes has to apply.

MR. KINNAIRD: Not for the fingerprints—for the fingerprints, your Honor?

THE COURT: Because the Federal law requires that two people conspire—two people agree to transfer a hand grenade from one person to another person. And as soon as the Federal law requires those two people to agree, then they have violated two sections of the California law.

MR. KINNAIRD: You have another provision that comes into effect then.

THE COURT: What is that?

MR. KINNAIRD: The first one—there are two points to your argument and I would like to make the first one.

If we require that they violate State law, they have yet though not—the transferee defendant has not yet incriminated himself in any legal way—

THE COURT: I don't care whether or not he has incriminated himself. The point is the Federal law requires him to conspire to violate the State law when he tries to comply with Federal law.

MR. KINNAIRD: Then I would ask—

THE COURT: A good honest man—not a member or a friend of the Black Panthers—but a good honest decent man. All right? Let's put him in that category.

He says, I want to get a hand grenade because I want to put it up on my mantel to bring back memories of World War II, the time when I was in my glory.

So he goes to somebody and he says, somebody who has a hand grenade, and he says, I can't transfer it to you unless we comply with the Federal registration requirements. And the Federal registration requirement forces those two men to conspire to violate State law.

MR. KINNAIRD: Then I believe the supremacy clause would knock them out of the wire for attempting to de-

velop a State prosecution because they were required to do a certain act to comply with Federal law.

THE COURT: Are you telling me then that the State law that says that you cannot possess a hand grenade is unconstitutional?

MR. KINNAIRD: No, your Honor.

THE COURT: You said so, you said so.

MR. KINNAIRD: I said if you complied—the question that your Honor was posing to me, as I understood it, was that if the Federal law requires a conspiracy violation of the State law it doesn't comply with the Federal law—

THE COURT: Doesn't it? Doesn't it? As a matter of reality, as a matter of practicality, as a matter of everyday common sense, doesn't the Federal law—not pertaining to all firearms or all guns—but in the very narrow context of hand grenades, require two people to conspire to violate State law?

I say it does. And therefore I have to grant the motion. There is no way you can get around that.

MR. KINNAIRD: Well, what is the basis then, your Honor—I mean if you say even if, to satisfy Federal law, it requires a violation of the State law—

THE COURT: He has incriminated himself.

MR. KINNAIRD: He has incriminated himself?

THE COURT: He has incriminated himself because he has conspired, there is evidence of his conspiracy to violate State law.

MR. KINNAIRD: By what statement of his, your Honor, the point—

THE COURT: The fingerprints.

MR. KINNAIRD: Well, the fingerprints are not self-incriminating.

THE COURT: The fact that they have gotten together and agreed.

MR. KINNAIRD: But there is nothing that he says, your Honor, that would indicate, that could be used against him as a testimonial compulsion from himself, and therefore—

THE COURT: You don't have to, you could indict them both for the conspiracy.

MR. KINNAIRD: And make the transferor an unindicted—

THE COURT: Certainly.

MR. KINNAIRD: Certainly. And there is nothing that would indicate here, and the defendant would have no right to assert any statement that he made to the transferor, because that is a statement made by a citizen, not a governmental statement. And therefore it is not self-incriminating. It is only the personal privilege.

THE COURT: His address, his fingerprints, his photograph.

MR. KINNAIRD: He is not saying it to the Government, your Honor. He is not making the representation of his name and address any more than you had in Minor versus Huie. In the situation there it is the transferor's testimony that is coming in against him which would constitute a violation of the law.

THE COURT: Doesn't Hanes say that merely by forcing him to comply with the registration requirements when he raises a defense of self-incrimination is a total and complete defense to the Federal charge? Didn't Hanes say that?

MR. KINNAIRD: Forcing him to comply, forcing him to testify against himself, because the compliance is the evidence, the compliance is a testimonial compulsion, there is no way to correct this situation upon receipt. There isn't any basis to do it. When the statute was drafted they specifically had in mind the Hanes language. And the congressional record makes it quite clear that the statute was drafted to circumvent and get around the self-incriminatory problems that existed in the previous Act.

THE COURT: Except that they forgot the footnote in Hanes, when they drafted the new Act they completely ignored the footnote in Hanes.

The footnote—I have to read them—the footnote 13, page 99, footnote 11 on page 97.

You see, this case is based upon a very narrow set of circumstances, and that is the hand grenades. If California didn't make hand grenades illegal then I think the result would be different.

MR. KINNAIRD: We would basically have just about the same problem as to any other regulatory statute, that is what we would call prohibitive regulatory—

THE COURT: Not the incrimination aspect.

MR. KINNAIRD: Well, then I may address myself to the question of immunity, the immunity provision that is contained in 5848, your Honor. If it is a contemporaneous crime that you are addressing yourself to and 5848 brings in the immunity position which says that no testimony that is derived from—

THE COURT: It doesn't say that. It says no information from the record or application shall be—that is very narrow.

MR. KINNAIRD: No information or evidence—

THE COURT: From—

MR. KINNAIRD: —obtained from an application, registration or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulation issued thereunder, except as provided in (b) be used directly or indirectly as evidence against that person in a criminal proceeding with respect to violation of law occurring prior to or concurrently with—

THE COURT: Yes, I know.

MR. KINNAIRD: Well, I would submit, your Honor, that any act that you would say that would require the commission of a crime—

THE COURT: No, no, no. It doesn't say act, it says any information or evidence from the records or application—

MR. KINNAIRD: Well, then the—

THE COURT: And the mere fact of giving a fingerprint is not evidence obtained from the record, but is an act independent of what the record says.

MR. KINNAID: Doesn't the fingerprint have to accompany the registration of transfer order?

THE COURT: Yes, of course.

MR. KINNAIRD: And it would be my interpretation, your Honor, that—

THE COURT: You couldn't use the fingerprints but you could use the testimony of the act of giving the fingerprints. Don't you understand the difference?

MR. KINNAIRD: Only in two ways, your Honor, do I comprehend the difference. One is if they gave the fingerprints in the presence of another person—

THE COURT: Yes.

MR. KINNAIRD: Then that person would be able to testify to that fact.

THE COURT: Yes.

MR. KINNAIRD: And that would be no self-incrimination because that person would be outside, and the personal privilege of self-incrimination would be individual, and that would not be violated.

If there was a third person present, if you were indicting the two of them and they both were on trial and neither could be a witness, then the statute would sufficiently protect them.

If there was a third person present, then that person could testify. And again neither of the two would have any self-incrimination privileges.

So my position on that would be that the self-incrimination privilege does not apply on the hypothetical that you gave because it is not substantial and real, the possibility of self-incrimination, which is the question the Court addressed themselves to in Minor versus Huie.

And the conclusion that I stated in the unpublished Tennessee decision in considering the same statute, which I am sorry I didn't have any more information to give your Honor because the thing just didn't give any more information.

But I would submit that in the hypothetical that your Honor poses, and upon which your Honor challenges and obviously is concerned with the constitutionality of this statute, there is not any real possibility of self-incrimination because of the interplay of 5848 and the personal aspect of the privilege against self-incrimination that either there is going to be independent evidence not subject to it, or you are going to have, you are going to have a protected act, because the act and the record are going to be the same. And under either theory there is not any substantial risk against self-incrimination, against the defendant being compelled to incriminate himself.

THE COURT: All right. Let's hear from Mr. Manes.

MR. MANES: First, your Honor, I would make the general observation that there were at pages 12 and 12-a of our response to the motion--

* * * *

THE COURT: All right, Mr. Manes.

MR. MANES: Yes, your Honor. Thank you.

I started to say, your Honor, that the point that we have argued on the scienter requirement was stated in our papers, in our response to the Government's opposition papers at pages 12 and 12-a where we stated and argued that the Government agent not only conceived the crime but participated in its commission and was the sole means of determining whether a crime would be committed.

And unless the defendant intended to possess unregistered devices, as a matter of law, I wanted to make that point that we are not coming up with that argument here just at the time of oral presentation.

The second point I wanted to make was in reference to an example that the Government cited to your Honor about the traffic offense where the police officer is chasing a traffic offender through a red light. And of course the difference from this situation is obvious. In the traffic situation the officer hasn't created a crime, he hasn't led the traffic offender through the red light, he is giving chase to an offender, one who has committed an offense in his presence, and he is in no way a participant.

The next point I wanted to make, your Honor, was in reference to, I think the colloquy between your Honor and counsel in the earlier stage of the Government's argument and it could be summed up in the following way: The principle that the Government must conform to its own laws and to its own regulations, the principle that is espoused in a number of the cases, all of which I am sure your Honor is familiar with.

And that principle, I would imagine, certainly would be applicable here, certainly where we look at 5822, Section 5822 of Title 26, and where we—excuse me, I misstated it—it is 5852, Section 5852, we find that, among other things, a series of subsections dealing with the general transfer of weapons and the imposition of tax requirements, in connection with those transfers.

And under Subsection (f) we find, after there has been a Subsection (a), a specific exempton accorded to the United States and departments thereof, we find under Subsection (f) that no firearm may be transferred or made exempt from tax under the provisions of this section, unless the transfer is made or is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulation prescribe.

And so therefore that law, it seems to me, is as applicable to a law enforcement officer who is acting pursuant to some investigation as it would be to any other transferor under any circumstances.

One more point that I want to make. The Government seems to make the contention that we cannot assert by way of example a standing such as the exemplar that your Honor posed, namely one who finds a grenade on the street. I would respectfully suggest, however, that at least on a motion to dismiss where we are attacking the face of the statute, we do have such a standing. We do have the right to assert and to attack the statute which is defective in a substantial or material aspect, even though not applicable specifically to the facts of this case. And there have been several Supreme Court decisions which have upheld that right, particularly in the area of vagueness.

THE COURT: Well, those are First Amendment cases, they have no applicability here.

MR. MANES: Well, I daresay that it isn't limited to the First Amendment. At least I don't know of any requirement that it is so limited, although it does most frequently appear in those types of cases.

Finally, your Honor, there is a question of course of jeopardy. We attempted to deal with the jeopardy point, your Honor, in our memorandum of points and authorities, beginning at page 6 of the opening memorandum.

Our basic contention was first that the violation here is not such as would necessarily furnish complete information to constitute the basis for a prosecution. It is only necessary that the information furnish a link towards prosecution.

The second point that we would make, of course, is that in three U.S. Code and Administrative News at page 34

and 35 it discusses the history of the Act. It appears quite clear that Congress was intending in the immunity provision to limit it really essentially to prosecution of violations of this particular law. And certainly it does not seem to reach California law—

THE COURT: Read that to me where you picked that up.

MR. MANES: Read that to you.

In Hanes

"* * * all weapons—" wait a minute, let's see—yes, that is the passage I think that we were referring to, which reads as follows, your Honor:

> "In Hanes versus United States," giving the citation "the Supreme Court held the registration requirement of the existing law constitutionally unenforceable because it requires registration almost exclusively by those in illegal possession of a weapon and made this information available to prosecute them for illegal possession. The Senate amendment avoids this problem by extending the registration obligation to all possessors of the weapons, legitimate or otherwise, and by providing that registration information may not be used directly or indirectly to prosecute a natural person for an offense prior to or concurrent with this registration."

But as I read that—

THE COURT: The immunity doesn't slop over to State requirements.

MR. MANES: Conceivably what I have just read doesn't say we are just limiting this to the statute. I read that in the statute.

I must confess that on rereading it it doesn't seem as clear as when I first looked at it. But I would respectfully suggest also that if this was meant to deal with the Hanes problem, I think the immunity statute does not expressly preclude the possibility that information provided from an affidavit, or from other sources required by the Secretary can be used, at least to furnish a link in a charge of conspiracy, of conspiring to attempt to violate State law with regard to possession.

And that of course if the problem with which we are basically confronted so far as the immunity is concerned. I just don't think it is broad enough. It doesn't preclude specifically anything about the State. And I think that we come within the terms of Marquette, 390 U.S. 39, where the Court in language makes it clear that the statute granting immunity has to be very precise and specific.

THE COURT: What page?

MR. MANES: At page 39.

THE COURT: What page says that?

MR. MANES: At page 53 through 54. I can read it to your Honor.

THE COURT: No, I have it here. Go ahead.

MR. MANES: Finally I want to go back to a question that your Honor posed to me very early in our original argument when your Honor asked us about the information that was required of a transferee.

I believe under Section 5822 that the information required must include, but is not limited to, fingerprints and photographs. And as a matter of fact, as I earlier pointed out, there are regulations in existence which seem to require more than simply the fingerprints and the photographs and the address, specifically they require an affidavit of necessity, which means of course exposure, I would assume, not just simply a desire of possession, but an indication of the purpose of such a possession, which would furnish, among other things, possibly information to violate the perjury statute.

I submit it, your Honor.

THE COURT: Anything else, Mr. Kinnaird?

MR. KINNAIRD: Just one or two points, your Honor. The only point, your Honor, in explanation to the preparation on the entrapment question which your Honor has considered and we have discussed at great length. I didn't receive their papers until today and I just haven't had an opportunity to research that.

If your Honor is inclined to make a ruling that because there was not a qualified transfer by the Secretary of the Treasury and therefore under an extension or adoption or whatever it may be called in this case, of the exclu-

sionary rule, we are going to dismiss the indictment, I would like to first have an opportunity to fairly and sensibly brief this, because in several respects—

THE COURT: No, I am not going to—I am going to grant the motion but I am not going to dismiss the indictment on that ground, Mr. Kinnaird.

MR. KINNAIRD: Then obviously we must be talking about the self-incrimination question.

THE COURT: Well, talking about the elements, the necessity of the indictment setting forth the elements of the crime, which the Court feels must include, one, knowledgeable possession; and, two, a knowledge of the character of device; and three, knowledge that it had not been transferred on the register.

MR. KINNAIRD: May I go to two points on that, your Honor.

First, as to the question of knowledgeable possession and knowledge of the character of what had been received, knowledge of the object itself. I believe the defendant—I believe that the case law supports it, and recent support of the word "possession," meaning knowing possession. I respectfully submit that in the case that we have cited, the Baker case in our brief, the entire concept of the use of the term "possession" means that the person has knowing possession, that he knows that he possesses it, to-wit, the hand grenade, he has hand grenades in his possession. That unequivocally is our burden.

As far as the elements of the offense, it is an element that is in the indictment by the term "possession" itself. I mean if I really was concerned, your Honor, I could add the term—

THE COURT: There would not be any problem.

MR. KINNAIRD: Well, to say knowingly possess—but I don't believe that that would be the basic question that your Honor is addressing himself to.

THE COURT: No, I indicated that in my opinion, based upon the vignettes that I gave you, walking down the street and finding a hand grenade, there is no question that even if knowing possession were placed in the indictment, that that still would not cure the problem of the scienter that I am talking about.

MR. KINNAIRD: And then on the question of scienter, your Honor, of course we have boiled it down to the basic question, I mean—also, your Honor desires to posture this in the clearest fashion that we possibly can so that we know that with which we have to cope as the time goes down the road.

If we are talking specifically of a scienter requirement, I would have to take the position, your Honor, that even in the hypothetical that you gave, and as I changed after I had a moment to think about it, the man would basically be guilty, yes. It may shock one's conscience to say that. But you are taking a situation where there is a duty on a person not to take possession of certain types of items period, whether they are on the street or not, means that he had better leave them alone. You have a—

THE COURT: In other words, let's not get involved.

MR. KINNAIRD: Basically that would be the position. Or if you do get involved, rest yourself upon the discretion that is built within the administration of the law from the prosecutor's angle, not to be concerned about it, I mean to give you the alternative which would be—

THE COURT: You see, it is strange. In the heroin law—and there is nothing more hideous or horrible than heroin—you have got a right to explain your possession.

MR. KINNAIRD: But possession there only overcomes one of the regulatory elements of the crime itself, which is giving the presumption to show that it was imported contrary to law, but you always have—

THE COURT: Yes, but anyway the law gives, for whatever reason the law gives you the right to explain your possession, it gives you a right to explain your possession. And if you can explain your possession satisfactorily to the jury you are not guilty.

MR. KINNAIRD: But you would still be guilty in the State Court if you gave the same explanation of your possession.

THE COURT: You would still be guilty, certainly.

MR. KINNAIRD: But you would not be guilty of importing heroin contrary to law.

THE COURT: That's right. That is the question.

MR. KINNAIRD: Whereas here we are specifically concerned with the possession itself. And I would like to say one thing. There has been a point made which I believe to a degree has permeated your Honor's thinking on this, which is the Lambert case and the basic inequities that—

THE COURT: No, no, I don't think Lambert is appropos whatsoever.

MR. KINNAIRD: I think it is a notice case, and I think we have the notice by the hand grenades.

THE COURT: Yes.

MR. KINNAIRD: But on the scienter requirement then I address myself exclusively, your Honor, to the overwhelming number of cases that we have cited at length in our brief and I am sure I could cite more where this question has been raised and raised and raised in connection with a regulatory statute of this type.

And the Ninth Circuit has held with us, I believe, and the Tenth Circuit, and I know of no cases that go contrary to this position on basically identical statutes of which we have only made a statutory amendment and set it into the old legislative scheme.

Now if your Honor—

THE COURT: Well, in the final analysis, when you read Justice Jackson's argument, and when you read his opinion, and when you boil it down he says that you have to determine the elements of scienter on the basis of, almost on a case-to-case basis. There is just no rule of thumb.

And I say that in this case—we might as well close it off, because we could argue it back and forth, and once I decide the case and you want to talk to me we will talk over a cup of coffee.

I am going to grant the motion to dismiss the indictment on the following grounds:

One. I don't believe that the statute cures the defects as pointed out in Hanes by reason of the fact that the law in California makes it a felony to possess hand grenades or destructive devices of the type as alleged in the Information. The law in California makes it a felony to conspire to possess destructive devices of the nature and

type as set forth in the Indictment; and the law in California makes it a felony to attempt to possess destructive devices of the type set forth in the Indictment.

And secondly, the Information is defective because the Information does not set forth the necessary elements of siante, which I believe is required in order to effect due process within the framework of the facts, of the admitted facts in this case: One, that the police officer deliberately and intentionally obtained hand grenades from the Department of the Navy, and then transferred those hand grenades to the defendant, knowing that the hand grenades had not been—without the right to transfer those hand grenades, without the approval of the Secretary of the Treasury as set forth in the Act of which the defendants are charged.

This will give you the right, Mr. Kinnaird, to appeal, of course, to the Supreme Court.

MR. KINNAIRD: Yes.

THE COURT: And give the Government the opportunity to fully explore the full aspects of this Act. It should provide a helpful means to the lower courts to determine what the opinion of the Supreme Court is.

MR. KINNAIRD: May your Honor stay the execution of this order for seven days so I can consult with all of my higher—

THE COURT: Oh, of course, of course.

I will suspend the execution of the effectiveness of the order—I will do this, Mr. Kinnaird:

The court will direct the preparation of the order of dismissal by Mr. Manes to be submitted to the court on February 27th, 1970 at 1:30 p.m. in this courtroom.

MR. MANES: Would your Honor order transcript of your Honor's decision?

THE COURT: No. Your clients are not indigent.

MR. MANES: Very good.

THE COURT: Are they?

MR. MANES: No.

THE COURT: Somebody gave $20,000.00 in cash to somebody.

MR. MANES: No, that was a mistake, as we learned later.

THE COURT: Anyway, they are not indigent.

MR. MANES: No, they are not.

THE COURT: February 27th, is that satisfactory?

MR. MANES: Satisfactory.

THE COURT: That will be on calendar.

MR. KINNAIRD: Now, may I just, for clarification, your Honor, when I have to talk to these folks that I work for—your Honor is not making any part of your holding for the lack of putting in the words "knowingly possessed"—

THE COURT: No.

MR. KINNAIRD: —you construe "possess" as meaning "knowingly possessed," as we argued?

THE COURT: Yes, yes.

MR. KINNAIRD: Thank you.

THE COURT: Yes. It has to be—you have to have more than that in there.

MR. KINNAIRD: But we are strictly on the intent question, that it must be alleged and proven.

THE COURT: Yes.

MR. KINNAIRD: As the scienter requires.

THE COURT: Yes.

MR. KINNAIRD: Which we all understand to mean a criminal intent, in this case knowledge that it wasn't registered.

THE COURT: Yes. Specific intent, knowledge it wasn't registered.

* * * *

[Filed March 10, 1970]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-Cr. (WJF)

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

ORDER OF DISMISSAL OF INDICTMENT

The motion of the above named defendants, Donald Freed and Shirley Jean Sutherland, to dismiss the indictment in the within cause came on for hearing on February 16, 1970, in the United States District Court for the Central District of California, Hon. Warren J. Ferguson, Judge Presiding.

Plaintiff appeared by its attorneys, Wm. Matthew Byrne, Jr., United States Attorney, by Dennis Kinnaird, Assistant United States Attorney.

Defendant Freed appeared by his attorney, Hugh R. Manes, Esq.,; defendant Sutherland appeared by her attorney, Luke McKissack, Esq.

The Court, having read and considered the motions, responsive papers and memoranda of law of the respective parties on trial herein, and having heard and considered the oral arguments presented by their respective counsel, and the cause having been submitted for decision, hereby makes the following findings, conclusions and orders, to wit:

One: Count I of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offends due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with

knowledge that such devices were or would be unregistered.

Second: Count II of said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violates due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered.

Third: 26 U.S.C. § 5861(d), and 26 U.S.C. § 5841(c), which statutes the indictment accuses defendants of violating, are unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury.

For each of the foregoing reasons, therefore:

IT IS HEREBY ORDERED that the Indictment herein, and each count thereof, be and the same hereby are dismissed.

DATED: March 10, 1970

/s/ W. J. Ferguson
Judge of the United States
District Court

[Filed April 7, 1970]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the indictment entered in this action on March 10, 1970.

This appeal is taken pursuant to 18 U.S.C. Section 3731.

2. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Complaint
Indictment
Notice of Motion to Dismiss Indictment
Opposition to Motion to Dismiss
Reply to Opposition to Motion to Dismiss
Order of Dismissal of Indictment
Transcript of Proceedings on February 16, 1970
Notice of Appeal

3. The following questions are presented by this appeal:

(1) Does Count One of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offend due process of law by failing

to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered?

(2) Does Count Two of the said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violate due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered?

(3) Are Sections 5861(d) and 5841(c) of Title 26 unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury?

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ DENNIS E. KINNAIRD
DENNIS E. KINNAIRD
Assistant United States Attorney
Attorneys for Plaintiff
United States of America

SUPREME COURT OF THE UNITED STATES

No. 345, October Term, 1970

UNITED STATES, APPELLANT

v.

DONALD FREED and SHIRLEY JEAN SUTHERLAND

ORDER NOTING PROBABLE JURISDICTION—
FILED OCT. 19, 1970

APPEAL from the United States District Court for the Central District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410130 347

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OCTOBER TERM, 1970

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD FREED AND SHIRLEY JEAN SUTHERLAND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

ORDER BELOW

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. A) is not reported.

JURISDICTION AND STATEMENT

A grand jury in the United States District Court for the Central District of California returned a two-count indictment charging appellees with conspiracy to possess and possession of destructive devices, hand

grenades, in violation of 26 U.S.C. 5861(d) (App. C). Appellees moved to dismiss this indictment. They alleged, *inter alia*, that the applicable provisions "seek to compel defendants to incriminate themselves contrary to the guarantees of the Fifth Amendment to the United States Constitution" and that the indictment violated due process in not alleging as an element of the offense that the possession charged had been with specific knowledge that the firearms had been or would be unregistered. The district court granted appellees' motion on March 10, 1970. It held that the indictment was deficient as a matter of due process for its failure "to allege the requisite element of scienter in connection with such alleged possession, that is, * * * knowledge and intent that the [hand grenades] were unregistered," and that Sections 5861 (d) and 5841(c) unconstitutionally "would compel the accused to furnish to the government * * * information tending to incriminate him or her under the laws of the State of California" (App., *infra*, p. 17).

The United States filed its notice of appeal to this Court in the district court on April 7, 1970 (App. B). By order of June 10, 1970, Mr. Justice Douglas extended the time for filing this jurisdictional statement to and including July 8, 1970. Under 18 U.S.C. 3731, this Court has jurisdiction of a direct appeal from a decision dismissing an indictment based upon a finding of invalidity of the statute upon which the indictment is founded or based upon a construction of the statute.[1] *United States* v.

[1] In this case, the contested construction is that the statute requires as an element of the offense specific knowledge that

Spector, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1; *United States* v. *Nardello*, 393 U.S. 286.

QUESTIONS PRESENTED

1. Whether 26 U.S.C. (Supp. IV) 5861(d), which proscribes the possession by an individual of a firearm not registered to him, impermissibly compels an accused to incriminate himself.

2. Whether 26 U.S.C. (Supp. IV) 5861(d) requires allegation and proof that a transferee of an unregistered firearm knew and intended at the time of transfer that the firearm which he possessed was not registered to himself, and, if not, whether the provision is unconstitutional.

STATUTES INVOLVED

26 U.S.C. (Supp. IV) 5841(b) provides:

> By whom registered.
>
> Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transfee by the transferor.

26 U.S.C. (Supp. IV) 5841(c) provides:

> How registered.
>
> Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or trans-

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a possessed firearm is unregistered; or else that the statute is unconstitutional.

ferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearms, and such authorization shall effect the registration of the firearm required by this section.

26 U.S.C. (Supp. IV) 5861(d) provides:

It shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *

* * * *

THE QUESTIONS ARE SUBSTANTIAL

1. The district court's opinion, if affirmed, would render federal control over certain types of dangerous weapons ineffective, and would extend the Fifth Amendment privilege against self-incrimination to circumstances in which this Court has recently held it does not apply. *Minor* v. *United States*, 396 U.S. 87.

Insofar as relevant here, federal statutes require that a registry be maintained for all firearms, which are defined to include, *inter alia*, destructive devices, such as hand grenades, capable of being concealed on the person. 26 U.S.C. (Supp. IV)[2] 5845. Before a firearm subject to registration may be transferred, the transferor must register the firearm, 26 U.S.C. 5841(c), identify the prospective transferee, 26 U.S.C. 5841(b), and pay a stated tax—in the case of a hand grenade, $200. 26 U.S.C. 5811(a). The transfer may

[2] All provisions cited were enacted as part of the National Firearms Act Amendments of 1968, 82 Stat. 1227, and appear in the current Supplement to the United States Code.

not occur, however, unless the Secretary of the Treasury approves it. 26 U.S.C. 5812(b). The Act specifically provides that the application "shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law," 26 U.S.C. 5812(a), and that truthful information contained on the application may not be used, "directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application * * *." 26 U.S.C. 5848(a). Regulations adopted under the statute elaborate these requirements, but do not change the basic framework set out in the Act. 26 C.F.R. 179.98-179.100, 179.202.

The district court found that "compliance by the accused with * * * 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury" (App., *infra*, pp. 16-17). While the statement is unexplained, the court appears to have considered the transferor the government's agent, and to have felt that the information he would have to obtain from the defendants and submit to the government in connection with an application for permission to transfer would in itself incriminate the defendants of the stated offenses.

Here, as in *Minor*, *supra*, however, the statute applies to legitimate as well as illegitimate activities, and forbids authorizing a transfer except to a person whose possession would be lawful under state and federal law; any other transfers are flatly forbidden, and any application for such a transfer would be rejected. If a transferee takes possession of a firearm without the requisite approval, he cannot thereafter make his possession legal. Thus, as in *Minor*, the only choice available to the transferee is that which lies before anyone confronted with a statute forbidding a particular act. He may obey or he may flout the law. He cannot obtain federal registration at the risk of disclosing a violation of state law. If his possession would be illegal under state law, he cannot comply with federal law. If his possession would be legal under state law, he would not be incriminating himself by complying with federal law.

While it is true that the regulations involve the potential transferee more deeply in the application process than was the case in *Minor*,[3] their effect is undoubtedly to discourage transferees who could never comply with the statute and secure permission for a transfer from ever applying. And to the extent the transferee's participation might be deemed required, but cf. *Minor*, *supra*, 396 U.S. at 91 n. 3, he falls within the reach of the statutory and regulatory provisions conferring immunity from any use, direct or

[3] A transferor must provide, in addition to his transferee's name and address, the transferee's fingerprints and photograph, and a certification by responsible state or federal officials that the transfer is for a lawful purpose. 26 C.F.R. 179.99.

indirect, of the information or evidence required to be submitted in prosecutions for prior or contemporaneous offenses. 26 C.F.R. 179.202; 26 U.S.C. 5848(a).

Thus, even supposing the California offense of conspiracy to possess a destructive device had been complete at the time a federal application for permission to transfer the hand grenades was required, and that the accused were required by the federal statute to submit information in connection with that application, no use, direct or indirect, could have been made of that information in any prosecution of them for the state offense. The state offense of unlawful possession of a destructive device, on the other hand, would not yet be complete. While the statute confers no immunity as to that offense, the information when given is not incriminatory of it—the offense not having been committed. And since anyone applying for federal permission to make the transfer would know at the outset that permission would be granted only if the transfer were lawful under state as well as federal law, it is inconceivable that the application would be made by a person determined to go ahead with the transfer whether or not permission were obtained.

This statutory scheme is thus entirely different from that which this Court held invalid in *Haynes* v. *United States*, 390 U.S. 85. The registration requirement in that statute was continuing, and this Court viewed it as "directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements, and who therefore are immediately threatened by criminal prosecutions * * *." *Id.* at 96. It remained possible to comply

with the federal registration provision at all times, but only at the risk of implicating oneself under another state or federal law. This statute was passed to eliminate that fault. H. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 3 U.S.C. Cong. & Adm. News 4426, 4435 (1968). The only point at which it imposes any duty on a transferee is at the point of transfer, and the duty at that point is to refuse to take possession of the firearm unless and until the Secretary has approved the transfer. 26 U.S.C. 5812(b). That duty gives no offense to the Fifth Amendment's privilege against self-incrimination.

2. The district court's conclusion that the indictment was insufficient for failure to allege that the defendants had obtained their alleged possession of unregistered destructive devices "with knowledge and intent that the same were unregistered" is necessarily a construction of the statute to require such a specific intent, and at the same time, a holding that the statute, otherwise construed, would violate due process of law. This narrowing construction is unwarranted, and substantially impedes implementation of the federal scheme; it is sufficient for constitutional and statutory purposes that the government establish (1) that the defendants knew that they were and intended to be in possession of the hand grenades;[*] and (2) that the hand grenades were in fact unregistered to them.

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[*] As the district court correctly noted at the oral argument on appellees' motion, there was no need to allege in the indictment that the possession itself was knowing and intentional, *i.e.*, that appellees knew they possessed the grenades and intended to do so. (Tr. 6).

The statute itself imposes no specific intent requirement. Section 5861(d) makes it unlawful "for any person to receive or possess a firearm which is not registered * * *" and nothing in its legislative history suggests that the non-registration must be shown to have been known to the recipient or possessor. That the government need not prove a defendant's knowledge as to lack of registration has been held in a number of cases arising under the predecessor to the Act involved here, which on this issue is substantially the same. *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *United States* v. *Fogarty*, 344 F. 2d 475 (C.A. 6); *Bryan* v. *United States*, 373 F. 2d 403 (C.A. 5); *United States* v. *Decker*, 292 F. 2d 89 (C.A. 6), certiorari denied, 368 U.S. 834. Under the statute, a person must know that he is receiving or possessing a firearm; the statute then casts upon him the duty to make certain, before he receives the firearm or takes possession of it, that the person from whom he gets it has authority for the transfer.

There is no constitutional barrier to this scheme. Although specific, guilty knowledge or intent of the type envisioned by the district court is required as to offenses derived from the common law, or *malum in se*, *Morissette* v. *United States*, 342 U.S. 246, 252, 260 *et seq.*, that requirement may be omitted in the case of criminal statutes with essentially regulatory purposes, "where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes," *United States* v.

Balint, 258 U.S. 250, 252, and "[i]n the interest of the larger good [the statute] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich*, 320 U.S. 277, 281; *Morissette*, *supra*, 342 U.S. at 252-260; see also *United States* v. *Behrman*, 258 U.S. 280. *Balint* involved the sale of opium without an order form; this Court held it a legitimate congressional purpose to "require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." 258 U.S. at 254. Here what is at issue is the transfer of firearms. A person can hardly be unaware that firearms are subject to regulation. Where the transferee knows that that is what he is receiving or possesses, it is clearly reasonable to require him to ascertain the authority for the transfer.[5]

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[5] In *Lambert* v. *California*, 355 U.S. 225, which invalidated on due process grounds a state statute which required registration by all persons who had been convicted of a felony, this Court stressed that the conduct involved was "wholly passive—[a] mere failure to register" (355 U.S. at 228) and "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed" (*ibid.*). The taking of possession of a grenade is certainly an act of such nature as to alert the recipient that he may be acting contrary to some applicable law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD L. ROSENFIELD,
Attorneys.

JULY 1970

APPENDIX A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-Cr. (WJF)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

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Defendant Freed appeared by his attorney, Hugh R. Manes, Esq.,; defendant Sutherland appeared by her attorney, Luke McKissack, Esq.

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One: Count I of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offends due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered.

Second: Count II of said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violates due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered.

Third: 26 U.S.C. § 5861(d), and 26 U.S.C. § 5841(c), which statutes the indictment accuses defendants of violating, are unconstitutional in that compliance by the accused with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code

Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury.

For each of the foregoing reasons, therefore:

IT IS HEREBY ORDERED that the Indictment herein, and each count thereof, be and the same hereby are dismissed.

DATED: March 10, 1970

/s/ W. J. Ferguson
Judge of the United States
District Court

April 7, 197

APPENDIX B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 4846-CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND,
DEFENDANTS

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3. The following questions are presented by this appeal:

(1) Does Count One of the indictment herein, charging defendants with knowing and wilful conspiracy to possess unregistered destructive devices in violation of 26 U.S.C. § 5861(d) offend due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally conspired to possess destructive devices with knowledge that such devices were or would be unregistered?

(2) Does Count Two of the said indictment, charging defendant Freed with possession, and defendant Sutherland with aiding and abetting such possession of unregistered destructive devices likewise violate due process of law by failing to allege the requisite element of scienter in connection with such alleged possession, that is, that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of destructive devices with knowledge and intent that the same were unregistered?

(3) Are Sections 5861(d) and 5841(c) of Title 26 unconstitutional in that compliance by the accused

with the latter statute, 26 U.S.C. § 5841(c), and the regulations promulgated thereunder, would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury?

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ DENNIS E. KINNAIRD
DENNIS E. KINNAIRD
Assistant United States Attorney
Attorneys for Plaintiff
United States of America

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
September 1969 Grand Jury

No. 4846 CD

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD FREED, SHIRLEY JEAN SUTHERLAND, DEFENDANTS

INDICTMENT

[18 U.S.C. § 371: Conspiracy; 26 U.S.C. § 5861(d): Possession of Unregistered Destructive Device; 18 U.S.C. § 2: Aiding and Abetting]

The Grand Jury charges:

COUNT ONE
[18 U.S.C. § 371]

Commencing on or about October 1, 1969, and continuing until the date of the filing of this indictment, in the Central District of California, defendants DONALD FREED and SHIRLEY JEAN SUTHERLAND, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, and with divers other persons whose names are unknown to the Grand Jury, to commit an offense against the United States, that is, to possess destructive devices, to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841

(c), Title 26, United States Code, in violation of Section 5861(d), Title 26, United States Code.

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED held a conversation with an undercover officer of the Los Angeles Police Department at John Brown Bookstore, 13526½ Van Nuys Blvd., Pacoima, California.

2. On or about October 1, 1969, in the Central District of California; defendant DONALD FREED placed a telephone call from a phone booth in Pacoima, California, to the defendant SHIRLEY JEAN SUTHERLAND.

3. On or about October 1, 1969, in the Central District of California, defendant DONALD FREED gave the heretofore mentioned undercover officer of the Los Angeles Police Department a phone number at which defendant DONALD FREED told him to call defendant SHIRLEY JEAN SUTHERLAND.

4. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

5. On or about October 1, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a second telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from a phone booth in Beverly Hills, California.

6. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND held a telephone conversation with the hereto-

fore mentioned undercover officer of the Los Angeles Police Department from a telephone booth in Beverly Hills, California.

7. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED held a telephone conversation with the heretofore mentioned undercover officer of the Los Angeles Police Department from his apartment at 1825 Beloit Street, West Los Angeles, California.

8. On or about October 2, 1969, in the Central District of California, defendant SHIRLEY JEAN SUTHERLAND placed and caused to be placed one hundred dollars ($100) in the mail box at her residence, 1144 Tower Road, Beverly Hills, California, in payment for a number of destructive devices, to wit: hand grenades.

9. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED tendered a one hundred dollar ($100) check in payment for a number of destructive devices, to wit: hand grenades.

10. On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades.

COUNT TWO

[26 U.S.C. § 5861(d), 18 U.S.C. § 2]

On or about October 2, 1969, in the Central District of California, defendant DONALD FREED possessed a number of destructive devices, to wit: hand grenades, which had not been registered to him with the Secretary of the Treasury or his delegate as required by Section 5841(e), Title 26, United States Code.

At said time and place, defendant SHIRLEY JEAN SUTHERLAND aided, abetted, counseled, induced, and procured the commission of the offense alleged above.

A TRUE BILL

_____

Foreman

_____

WM. MATTHEW BYRNE, JR.
United States Attorney

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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 345

UNITED STATES OF AMERICA,

Appellant,

vs

DONALD FREEMAN and
SHIRLEY JEAN SUTHERLAND,

Appellees.

MOTION TO AFFIRM
MOTION TO DISMISS

Appeal from the United States
District Court for the Central
District of California
The Honorable W. J. Ferguson,
District Judge

LUKE McKISSACK
Attorney at Law
Suite 521
Hollywood, California 90028
(213) 466-7331
Attorney for Appellees

IN THE

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IN THE

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October Term, 1970

No. 345

UNITED STATES OF AMERICA,

Appellant,

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DONALD FREED and SHIRLEY JEAN SUTHERLAND,

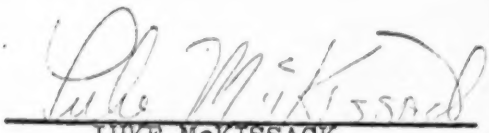
Appellees.

On Appeal from the United States District Court
For the Central District of California

MOTION TO AFFIRM JUDGMENT;
MOTION TO DISMISS APPEAL.

Prospective Appellees' Donald Freed and Shirley Sutherland move this Court to Dismiss the Appeal and Affirm the Judgment

because the Government's appeal is not authorized by the relevant statute, namely 18 U.S.C., Section 3731.



LUKE McKISSACK
Attorney for Appellees

I

PROSPECTIVE APPELLEES SUTHERLAND AND FREED ASK THAT THE GOVERNMENT'S APPEAL BE DISMISSED IN THAT THE TRIAL JUDGE'S DECISION WAS HYBRID IN NATURE, BASED SUBSTANTIALLY ON FACTUAL CONSIDERATIONS AND VARIOUS TREASURY REGULATIONS AND CONSEQUENTLY NOT REVIEWABLE ON APPEAL.

This Court has often stated that the Government's right to appeal is entirely statutory in origin and is to be strictly construed.

Will v. United States (1967)
389 U.S. 90
88 S. Ct. 269

United States v. Mersky (1960)
361 U.S. 431
80 S. Ct. 459

Di Bella v. United States, Fla.-N.Y. (1962)
369 U.S. 121
82 S. Ct. 654

Government appeals are unusual, exceptional, and not favored.

United States v. Borden Co. (1939)
308 U.S. 188, 192
60 S. Ct. 182

United States v. Apex Distributing Co. (9th Cir. 1959)
270 F2d 747

In the instant case the decision of the

trial judge to terminate the proceedings was based upon a number of coalescing considerations.

In the first place, more than the sterile indictment was before the Court. There was data obtained pursuant to a Bill of Particulars which revealed that the police agent in question purchased hand grenades from a Long Beach Naval Arsenal and violated the selfsame law he sought to convict the defendants of infringing by failing to register the grenades. Moreover, it was concluded that the crime was capable of commission only by this act of dereliction by the police agent since there is no federal crime to possess hand grendades, although there is a state statute covering the subject. (California Penal Code Section 12303). The Court's reasoning is replete with notions that the Government may not profit from its own wrongdoing, or participate in a violation of the same law sought to be leveled against appellees. Although the formal result was a dismissal of the indictment that characterization is not controlling.

United States v. Thompson (1920)
251 U.S. 407
40 S. Ct. 289

What in effect was done here was to evaluate

the conduct of the police agent vis a vis the defendants and dismiss the case. Accordingly a decision on the facts was reached and the case is not ripe for review.

A second reason that the appeal is not authorized springs from the fact that the trial court's determination was not simply based on an interpretation of a statute but rather also included an interpretation of treasury regulations. (See e.g. Transcript of Proceedings of February 16, 1970 at pp. 9-10). For the proposition that a decision which construes regulations as opposed to a "statute" is not appealable we rely on the dissenting opinions in United States v. Mersky (1960), 361 U.S. 431, 80 S. Ct. 459.

For the above mentioned reasons Appellees urge this tribunal to dismiss the appeal and affirm the judgment.

Respectfully submitted,

LUKE McKISSACK
Attorney for Appellees

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California 90028. On September 23 , 1970, I served the within Motion to Affirm on the Appellant in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
Federal Courthouse
312 N. Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true and correct.

Executed on September 23 , 1970, at Los Angeles, California.

Geraldine Cornwell

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 345

UNITED STATES OF AMERICA, APPELLANT

v.

DONALD FREED AND SHIRLEY JEAN SUTHERLAND

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

ORDER BELOW

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. 43–44) is not reported.

JURISDICTION

The order of the district court was entered on March 10, 1970 (App. 43). The notice of appeal was filed on April 7, 1970 (App. 45), and this Court noted probable jurisdiction on October 19, 1970 (App. 47). Under 18 U.S.C. 3731, this Court has jurisdiction of a direct appeal from a dismissal of an indictment based upon the invalidity or construction of the statute upon

which the indictment is founded.[1] *United States* v. *Spector*, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1; *United States* v. *Nardello*, 393 U.S. 286.

QUESTIONS PRESENTED

1. Whether 26 U.S.C. (Supp. V) 5861(d), which proscribes the possession by an individual of a "firearm" not registered to him, impermissibly compels an accused to incriminate himself.

2. Whether 26 U.S.C. (Supp. V) 5861(d) requires allegation and proof that a transferee of an unregistered "firearm" knew and intended at the time of transfer that the "firearm" which he possessed be not registered to him, and, if not, whether the provision is constitutional.

STATUTES INVOLVED

26 U.S.C. (Supp. V) 5812 provides:

> (a) Application.
>
> A firearm[2] shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp

[1] In this case, the contested construction is that the statute, unless it is to be unconstitutional, requires as an element of the offense specific knowledge and intent that a possessed firearm be unregistered.

[2] 26 U.S.C. (Supp. V) 5845 defines "firearm" to include, in general, short-barreled guns other than pistols, machine guns, silencers, and destructive devices such as bombs, rockets and grenades.

affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession.

The transferee of the firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. (Supp. V) 5841(b) provides:

By whom registered.

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

26 U.S.C. (Supp. V) 5841(c) provides:

How registered.

Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm

> in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

26 U.S.C. (Supp. V) 5861(d) provides:

> It shall be unlawful for any person * * * (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record * * *

* * * * *

STATEMENT

A two-count indictment filed on October 15, 1969 in the United States District Court for the Central District of California charged appellees with conspiring to possess unregistered hand grenades (count 1) and the completed substantive act of possession (count 2),[3] both in violation of 26 U.S.C. (Supp. V) 5861(d). Following a pre-trial hearing conducted on February 16, 1970, the district court dismissed the charges. The court ruled that the indictment violated due process by failing

> to allege the requisite element of scienter in connection with such alleged possession, that is, that defendants knowingly and intentionally

[3] On count 2, appellee Freed was charged with actual possession, and Sutherland with aiding and abetting.

> conspired to possess [and that defendant Freed possessed, and defendant Sutherland aided and abetted his alleged possession of] destructive devices with knowledge that such devices were or would be unregistered.

The court also held that the federal statute which required registration, 26 U.S.C. (Supp. V) 5841 and 26 U.S.C. (Supp. V) 5861(d), is unconstitutional because, in the court's view, compliance by appellees with the statute and its supporting regulations

> would compel the accused to furnish to the government, through its agent, information tending to incriminate him or her under the laws of the State of California, and particularly, California Penal Code Sections 12301 and 182, which make the mere possession and conspiracy to possess destructive devices a felony, whether or not registered with the Secretary of the Treasury. [App. 44.]

SUMMARY OF ARGUMENT

I

The regulatory scheme which this Court found imperiled Fifth Amendment rights in *Haynes* v. *United States,* 390 U.S. 85, has since been revised and, as revised, presents no such problem. Just as in *Minor* v. *United States,* 396 U.S. 87, the class of individuals subject to the Act now includes a broad class of persons, not just those particularly suspect of crime. The class of persons who are permitted to register or accept transfers from registrants is limited to those whose control of the weapons appears to be lawful.

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The only weapons which may be transferred are those which are already lawfully registered, and a weapon once unlawfully held may not be so registered. Finally, the revised statute repeals a previous provision of law, 26 U.S.C. 6107, which directed law enforcement officials to share registration information with other law officers; rather, the statute now explicitly states that no information or evidence provided the government in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant in a criminal proceeding regarding prior or concurrent offenses.

These changes fully insulate the statutory provisions from the self-incrimination claims which this Court upheld in *Haynes*. Like the seller of narcotics in *Minor*, the transferee of a firearm is not confronted with a dilemma in which he apparently can comply with one part of the statute, but only at the risk of incriminating himself under another. The realities of the situation are such as to make it wholly improbable that a transferee seeking a weapon for unlawful purposes would ever turn to the holder of a lawfully registered weapon, seeking to use the statutory procedures for transfer. Since all other transfers are flatly unlawful, with not even an illusory promise in the statute that they can be rehabilitated, a claim that the requirement of providing information on the registration forms is incriminatory is at best marginal. In any event, the Act requires no self-incrimination on the transferee's part, since all information must come from the transferor; and if information were thought

required, 26 U.S.C. (Supp. V) 5848 directly confers immunity from its use in any criminal prosecution for completed or contemporaneous offenses. Information in the Director's files is no longer available for sharing with other law enforcement officers, and the administration of the Act shows this insulation to be effective. In sum, there is no real danger of self-incrimination under the statute.

II

The district court erred in construing Section 5861 (d) as requiring as an element of the government's proof a showing that a transferee obtained possession of a firearm with specific knowledge and intent that the firearm be unregistered. The statute contains no language suggesting the need for such proof, and the history of its predecessors, both in Congress and in the courts, conclusively shows that such a construction has never been thought to be part of the statute, or necessary to save the statute from constitutional doubt. All that the government needs to show is that the individual charged possessed the firearm which was unregistered, with knowledge that it was a firearm, and with intent to possess it.

Given the extremely dangerous character of firearms subject to the Act, it is inaccurate to characterize such a construction as imposing a penalty "for conduct alone without regard to the intent of the doer." *Lambert* v. *California,* 355 U.S. 225, 228. The very nature of the weapons is sufficient to apprise an individual possessing them that they are likely to be regulated, and thus is also sufficient to make a failure

to inquire as to the lawfulness of the possession culpable behavior in the ordinary sense. Hand grenades are certainly no less dangerous then narcotic drugs, as to which similar penalties have always been found proper. *United States* v. *Balint,* 258 U.S. 250, 254. But even if it were thought that this law does impose "absolute" or "strict" criminal liability, the *Lambert* case indicates that legislators have wide latitude so to define an offense. This is not a case like that one, where the "wholly passive", and on its face innocuous, act of presence in a city was held insufficient to apprise the individual of any duty to register his presence with the police. The government must show that appellees were in the possession of hand grenades, knowingly and intentionally; but it need not show any knowledge or intent on their part that these grenades be unregistered.

ARGUMENT

I

THE REGISTRATION REQUIREMENTS PRESENT NO SELF-INCRIMINATION DILEMMA

The district court held that 26 U.S.C. (Supp. V) 5861(d) and 5841(c) are unconstitutional upon Fifth Amendment grounds identical to those urged with respect to its predecessor statutes by the petitioner in *Haynes* v. *United States,* 390 U.S. 85. Yet in *Haynes,* as in the related cases of *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, this Court rejected the proposition that such registration is unconstitutional on its face. Rather, the

Court determined that the challenged statutes were part of a valid taxing plan, but that the Fifth Amendment privilege, timely asserted, provided a complete defense to one charged with failing to comply with certain potentially incriminating registration provisions within the pertinent statutory schemes. *Marchetti, supra,* 390 U.S. at 61; *Haynes, supra,* 390 U.S. at 99. The statutory scheme in question here is the successor to the one involved in *Haynes,* and contains in large part—but with notable exceptions designed to achieve conformity with *Haynes*—the same general format as its predecessor. The issue presented in this case is, as in *Haynes,* whether the timely assertion of the Fifth Amendment privilege provides a complete defense to appellees. Neither at the hearing nor in its subsequent order did the court below give any indication why it could not resolve the constitutional question consistently with *Marchetti-Grosso-Haynes.* Accordingly, the district court was clearly in error in holding 26 U.S.C. (Supp. V) 5861(d) and 5841(c) unconstitutional.

A. THE REVISED STATUTORY SCHEME MADE SIGNIFICANT CHANGES IN THE SCHEME BEFORE THE COURT IN HAYNES

Following the decision in *Haynes,* Congress revised the National Firearms Act with the express purpose of overcoming the defects in the existing laws unveiled in *Haynes.* See S. Rep. No. 1501, 90th Cong., 2d Sess., 26, 42, 48, 52. Section 5841 requires registration with a central federal registry of all firearms covered under the Act, excluding only those in the possession or under the control of the United States. Save for an amnesty period which ended ten months before

the transfer alleged here, however, the initial registration of a firearm can be effected only by the manufacturer, importer, or maker of the weapon. Whenever a registered firearm is transferred, it must be registered to the transferee by the transferor. Firearms registered under the prior Act on the effective date of the new Act were automatically registered under the new Act; firearms not so registered and no longer in the possession of their manufacturer, importer, or maker on that date could be registered during the one-month statutory amnesty period, but not thereafter.[4] In addition, the revisions, eventually passed as Title II of the Gun Control Act of 1968, significantly expanded the coverage of the National Firearms Act, in particular so as to include "destructive devices" as covered "firearms." Section 5845(f) broadly defines this term to include explosive, incendiary, or poison gas bombs, rockets, missiles, mines,

[4] 82 Stat. 1235–1236. While this period could have been extended, the Secretary of the Treasury did not do so.

The Alcohol, Tobacco and Firearms Division, Internal Revenue Service informs us that prior to the enactment of the Gun Control Act of 1968, approximately 108,000 firearms were registered on the National Firearms Registration and Transfer Record. During the amnesty period, from November 2, 1968 to December 1, 1968, approximately 60,000 firearms were registered. Since December 2, 1968, approximately 14,800 firearms have been registered and entered in the National Firearms Registration and Transfer Record, as a result of lawful manufacture, importation or making. The National Firearms Registration and Transfer Record now contains a record, therefore, of approximately 182,000 firearms coming within the purview of the National Firearms Act.

and grenades,[5] the last being the type of weapon involved in this case.

A lawful transfer of a statutory firearm may be accomplished only if the weapon is already registered. Prior to the actual transfer of the weapon, the transferor must pay the transfer tax and receive an adhesive stamp denoting payment, 26 U.S.C. (Supp. V) 5811, which he affixes to the original of an application he submits in duplicate to the Director, Alcohol Tobacco and Firearms Division, Internal Revenue Service.[6] The transferor must identify himself by occupational tax number, if any, and by name and address. He must additionally describe the weapon to be transferred and furnish the name and address of the proposed transferee. Finally, the application must be supported by photographs and fingerprints of the transferee and by a certification of a particularly described local or federal law enforcement official (or other person acceptable to the Director) that he is satisfied that the fingerprints and photograph are those of the transferee and that the weapon is intended for

[5] The term "destructive device" does not include a device neither designed nor redesigned for use as a weapon, nor one which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique. 26 U.S.C. (Supp. V) 5845(f); compare 26 U.S.C. (Supp. V) 5845(a).

[6] No special government-furnished application form is required or available. The Director will accept as a valid application any written communication upon which the stamp has been affixed and in which the necessary information is contained.

lawful uses. 26 U.S.C. (Supp. V) 5812(a); 26 C.F.R. 179.98–179.99.[7]

Transfer of an unregistered weapon will not be approved. Even as to registered weapons, the Director reviews the information on the application before giving his approval and determines whether the transferee's possession of the weapon will violate any federal or local laws. 26 U.S.C. (Supp. V) 5812(a). If so, the original copy of the application will be returned with a statement of the reasons for rejection. If the application is approved, notice to that effect is put on the original copy of the application letter, which is returned to the applicant; the duplicate is placed in the central registry. Only after receipt of the approved application form is it lawful for the transferor to hand over the weapon to the transferee; at the same time, he is to give the approved application to the transferee. 26 C.F.R. 179.100. The information in the hands

[7] Evidently as a result of oversight, 26 C.F.R. 179.99 has not been changed since the adoption of Title II of the Gun Control Act of 1968. Under the prior laws the transferee was the applicant. See *Haynes* v. *United States*, 390 U.S. 85, 88–89; Brief for the United States in opposition to the Petition for a Writ of Certiorari in *Rayborn* v. *United States*, No. 5350, this Term, certiorari denied, October 12, 1970. Accordingly, the regulation still refers to the "applicant" as the one required to submit his own photographs, fingerprints, and law enforcement official's certificate. That, however, is clearly inconsistent with the present pertinent statute, Section 5812(a). We are informed that measures are being taken to update the regulation. In the meantime, all inquiries regarding the inconsistencies between the statute and regulation are being handled by the Alcohol, Tobacco and Firearms Division, which is furnishing prospective applicants with a description of the correct procedures for transferring firearms.

of the Director is not available to any one outside the Alcohol, Tobacco and Firearms Division, and cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law, except in cases charging the submission of false information in the application. 26 U.S.C. (Supp. V) 5848; 26 C.F.R. 179.202.

The present statute thus differs from that before this Court in *Haynes* in a number of respects.

1. The class of individuals who are required to register weapons has been enlarged to include all possessors of weapons covered by the Act, with the exception of the federal government. See *United States* v. *Valentine*, 427 F. 2d 1344 (C.A. 8); 26 U.S.C. (Supp. V) 5861. Thus, it is no longer true that "only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." *Haynes* v. *United States*, 390 U.S. 85, 87; H. Rep. No. 1956, 90th Cong., 2d Sess., p. 35.

2. The class of persons who are permitted to register or to accept transfers from registrants is limited to those whose control of the weapon appears to be lawful. This sharply contrasts with the registration requirements under the previous statutory system. There, any possessor of a covered firearm was compelled to disclose the fact of his possession by registration at any time he maintained possession. The Court in *Haynes* found that if a possessor attempted to comply with the registration provisions he would simultaneously reveal his own noncompliance with other provisions, as well as furnish potentially incriminat-

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ing information which the federal government made readily available to state, local and other federal officials. *Haynes, supra,* 390 U.S. at 95–100. Under the present scheme, as relevant here[8] only those possessors who lawfully make, manufacture or import firearms can lawfully register them. Individuals not within the class of lawful registrants described above simply cannot register a firearm. Prior to divestiture of possession by transfer to another, a lawful registrant must furnish information to the government as required by the transfer provisions of the law—in effect substituting the name of the transferee for his own as lawful possessor of the weapon. A would-be transferor who unlawfully possesses firearms can do nothing to legitimize a transfer.[9] In either case, the transferee does not and cannot register. Unless the gun has been registered to him by the transferor, full and literal compliance with the law for the transferee means nothing more than a refusal to take possession at all. *Minor* v. *United States,* 396 U.S. 87; *United States* v. *Black,* No. 20076, decided September 14, 1970 (C.A. 6); *United States* v. *Davis,* 313 F. Supp. 710 (D. Conn.); *United States* v. *Schofer,* 310 F.

[8] The statutory amnesty period, n. 4 *supra*, ended on December 1, 1968. The transfers alleged in the indictment occurred on or about October 2, 1969. App. 6–7.

[9] A theoretical problem may be presented under the statute, as worded, regarding the individual who finds a firearm and seeks to bring it to law officers for custody. Although it is clear such a person would never be prosecuted, the statute appears to make that conduct an offense. The possibility of the question arising is remote, however, and has no bearing on the sufficiency of this indictment.

Supp. 1292 (E.D. N.Y.); *United States* v. *Britton*, 306 F. Supp. 94 (S.D. Tex.).

3. The revised statute repeals 26 U.S.C. 6107, which provided for the sharing of firearms registration and transfer information with other law enforcement officials (Sec. 203(a), Pub. L. 90–618), and explicitly states that no information or evidence provided the government in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant in a criminal proceeding regarding prior or concurrent offenses (26 U.S.C. (Supp. V) 5848). In actual practice, we are informed, no information contained in an application to register or in the record of registration is disclosed to any law enforcement authorities, except as the fact of non-registration may be necessary to investigation or prosecution under this statute. Thus, Congress has done through legislation what this Court felt judges could not do as a matter of statutory construction in *Marchetti-Grosso-Haynes*, 390 U.S. at 58–59, 68–69, 99–100, placing restrictions on the use of information obtained through the registration procedures in order to permit the continued gathering of that information.

B. TRANSFEREES OF FIREARMS DO NOT FACE A REAL AND APPRECIABLE HAZARD OF SELF-INCRIMINATION

These changes insulate the statutory provisions from self-incrimination claims fully as effectively as the Harrison Narcotics Act provisions upheld last Term in *Minor, supra*, and thus achieve the congressional objective of establishing a scheme for firearms registration which does not infringe on the privilege. Like

the seller of narcotics in *Minor*, the transferee of a firearm is not confronted with a dilemma in which he apparently can comply with one part of the statute, but only at the risk of incriminating himself under another.[10] As there, he is flatly forbidden to proceed with the transfer until he has received a federal certificate of its legality—in *Minor*, an order form; here, an approved application for transfer. That certificate will not be issued unless the transfer is fully lawful. And if the transferee proceeds without a certificate it is that fact alone, and not any information supplied by the transferor in making an application or any failure by the transferee to perform subsequent incriminating acts, which the government must prove and which establishes his guilt.

As in *Minor*, it is unrealistic to believe that a lawful possessor of a registered firearm will often be involved in a prohibited transfer of such a weapon. By hypothesis, the weapon is in his custody with the

[10] The district court apparently found such a dilemma by interpreting California law to make any effort to obtain possession of a hand grenade an offense, so that the mere supplying of fingerprints to the federal government in connection with an application would be an offense. App. 28–33. Even assuming that that was a correct interpretation, see n. 12 *infra*, and that the fact of supplying fingerprints would be known to state authorities, see pp. 12–13, 20–21, no such dilemma realistically exists. It would then be known from the outset that an application for transfer would be futile, since it could be approved only if possession were lawful in California; there would be no lawful possessor in California who could be called upon to make an application for transfer. And even if an application were made, implicit in an application is the request that the transfer be approved only if lawful—giving the potential transferee a complete defense to any state prosecution for attempted possession or conspiracy to possess.

knowledge and approval of the authorities; he knows the requirements for transfer and presumably could find a lawful transferee should he wish to sell his firearms; he also knows that an unexplained disappearance of the weapon from his custody could bring criminal sanctions in its wake. In turn, persons wishing to obtain firearms for unlawful purposes will not wish to call attention to themselves by causing the filing of applications which stand no chance of success. Realistically, they will seek the firearms by unauthorized transfers in which the issue of complying with the Act's requirements will never arise, because the transferor could not possibly comply. Compare *Minor, supra,* 396 U.S. at 92–94, 96–97. In these circumstances, the claim that those requirements give rise to a Fifth Amendment objection on the part of potential transferees is simply irrelevant; any transaction with a transferor who can not lawfully transfer the firearm is strictly forbidden, and thus can never give rise to information which the government could use to incriminate.

Even in the unlikely case where an "unlawful" transferee approaches a willing, lawfully registered potential transferor, the Act requires no self-incrimination on the transferee's part. First, the burden of supplying information is placed on the transferor, not the transferee; ordinarily, a person may not claim the privilege with respect to information supplied the government by another. *Mower* v. *United States,* 402 F.2d 982, 985 (C.A. 8), certiorari denied, 394 U.S. 990; see *Minor, supra,* 396 U.S. at 91 n. 3. While it is true that transferees here, unlike petitioners in

Minor, must cooperate to the extent of supplying fingerprints and photographs which can be verified by a proper authority as genuine, such items would not usually be regarded as testimonial in nature. *Schmerber* v. *California,* 384 U.S. 757, 762; *Gilbert* v. *California,* 388 U.S. 263. And to the extent any information provided through the transferor might be deemed compelled vis-a-vis the transferee, the statute directly confers immunity from its use in any criminal prosecution for completed or contemporaneous offenses. In any event, it makes clear that the information is not to be shared with state or federal law enforcement officers in the manner previously authorized under 26 U.S.C. 6107, now repealed.

Immunity from use of the information supplied in connection with prosecution for violations of law "occurring prior to or concurrently with the filing of the application" gives ample protection to any claim of privilege in the context of this statute. As this Court noted in *Marchetti, supra,* 390 U.S. at 53–54, the applicability of the Fifth Amendment privilege to future conduct has rarely been in issue because prospective acts "will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." This is the precise situation in the registration of firearms. Applicants must obtain verification from a responsible official that the weapon is not intended to be used for unlawful ends. The only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The likelihood that individuals would incriminate themselves in the future by the mere act of applying is "a hypoth-

esis more imaginary than real." *Minor, supra,* 396 U.S. at 94. See also *Varitimos* v. *United States,* 404 F.2d 1030 (C.A. 1), certiorari denied, 395 U.S. 976. Section 5848 serves as an adequate use-restriction statute within an otherwise enforceable statutory scheme.[11]

In sum, the district court erred in its conclusion that the Act required appellees to furnish information which would have tended to incriminate them under California law, particularly California Penal Code §§ 12301 and 182.[12] Even assuming, as seems unrealistic, that their transferor could and would have filed an application to transfer the hand grenades to them, authority to do so could not have been granted unless it were first determined that the transfer was completely lawful, under both state and federal law. Al-

[11] Should the Court conclude, however, that the protection of registrants against prospective acts is a matter of actual rather than imaginary need within the framework of the firearms laws, Section 5848 may be interpreted to extend that far. In enacting Title II of the Gun Control Act of 1968, Congress expressly stated that it was intended to correct the infirmities of the existing statutory scheme relating to taxation of firearms. H. Rep. No. 1956, 90th Cong., 2d Sess., p. 35; S. Rep. No. 1501, 90th Cong., 2d Sess., 26, 42, 48, 51–52. That purpose is further manifested by the repeal of 26 U.S.C. 6107 (repealed by Section 203 of Pub. L. 90–618, Oct. 22, 1968) which provided for a list of "special" taxpayers and the furnishing of information therefrom to State and local prosecuting officers. See *United States* v. *Carlie,* No. Cr–70–101 (N.D. Cal.), decided May 21, 1970. Courts here are thus free of the inhibitions which this Court felt in *Marchetti-Grosso-Haynes, supra,* p. 15, and could properly construe the statute to provide the necessary protection.

[12] Section 182 is the State's general conspiracy statute. Section 12301 merely defines the term "destructive device" used in other

though the duplicate copy of any application would have been retained by the Director in a file for record-keeping purposes, the information contained therein would be withheld from disclosure to any parties outside the Alcohol, Tobacco and Firearms Division, including other government agencies. 26 U.S.C. (Supp. V) 5848. Since the repeal of 26 U.S.C. 6107, States have no access to the federal government files on weapons in private hands, or proposed transfers which have been rejected. The possibility of a State officer obtaining any information about a transferee of a weapon from the Director is, therefore, so remote as to render the potentiality of self-incrimination to the

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provisions of the code. The significant law is Section 12303 (1968 Cum. Supp.), which provides in pertinent part:

> Any person * * * who, within this state * * * possesses * * * any destructive device * * * except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison for a term not to exceed three years, or by a fine not to exceed five thousand dollars ($5,000), or by both such fine and imprisonment.

§ 12302 provides for exemptions from the prohibition of the chapter to peace officers, military personnel, and fire fighting personnel. Furthermore, § 12305 provides for the issuance of permits to conduct a business using destructive devices "upon a satisfactory showing [of] good cause." § 12306 provides for permits for non-business purposes upon a similar showing. Presumably, the granting of a permit brings the holder within the exception language of § 12303. Thus, there appears to be no blanket prohibition in California against possession of destructive devices. Changes in the chapter dealing with destructive devices subsequent to the decision appealed from do not appear to alter this conclusion. See, *e.g.*, Chapter 771, Assembly Bill No. 1003 (Cal. Legis. Service 1970), which expands both the types of devices covered and the variety of prohibited

transferee "imaginary and unsubstantial."[13] *Marchetti, supra,* 390 U.S. at 48. But if a State official should be able to gain access in some unforeseen way, the information thereby obtained would be suppressible at a subsequent proceeding. See *United States* v. *Troska,* No. 4–69–Crim. 72, decided June 16, 1970 (D. Minn.). *United States* v. *Carlie,* No. Cr.–70–101, decided May 21, 1970 (N.D. Cal.). *Murphy* v. *Waterfront Commission,* 378 U.S. 52; *Marchetti* v. *United States,* 390 U.S. 39, 58–60. In light of these protections, a proposed transferee of a firearm faces no real hazard of self-incrimination from the proposed transferor's acts in seeking authority for a transfer as required by law.

II

THE STATUTE DOES NOT REQUIRE AN ALLEGATION THAT THE POSSESSION WAS ACCOMPLISHED WITH KNOWLEDGE AND INTENT THAT THE FIREARMS BE UNREGISTERED

A. THE STATUTE REQUIRES NO SPECIFIC INTENT

Section 5861(d) makes it unlawful for any person "to receive or possess a firearm which is not registered to

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uses: and Chapter 741, Assembly Bill No. 970 (Cal. Legis. Service 1970) which increases the punishment permissible under § 12303 to a possible 5 years in state prison. It would be possible to comply with the provisions of both California and federal law and legally possess destructive devices for lawful purposes. And see n. 10 *supra.*

[13] The custodian of the National Firearms Registration and Transfer Record advises us that since November 1, 1968, only two inquiries have been made as to whether a firearm was registered or whether a particular person has any firearms registered to him. In each instance, the inquirer was told, in accordance with Section 5848, that the records were privileged and that no information contained therein could be divulged

him in the National Firearms Registration and Transfer Record." Nothing contained in the language of the statute suggests the need for proof that the defendant must have known and intended that the firearms were and would be unregistered. The legislative history of the provision is silent on this point. But the statute is derived from an earlier provision, and the history of that enactment makes it plain that an indictment charging a violation of the present law need not allege specific knowledge and intent that the firearms be unregistered.

The forerunner of 26 U.S.C. (Supp. V) 5861(d) was 26 U.S.C. 5851, which made it unlawful to receive or possess a firearm transferred or made unlawfully, or to possess an unregistered firearm.[13] The specific prohibition against possession of "any firearm which has not been registered * * *" was added to section 5851 by Title II, § 203(h) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1275, 1428, and was said to be intended primarily to simplify and clarify the law "and to aid in prosecution." H. Rep. No. 481, 85th Cong., 1st Sess., 195–196. No consideration ap-

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or used in any criminal proceeding for violation of any law occurring prior to or concurrently with the registration. The custodian also indicates that, to the best of his knowledge, no information contained in any applications to register or record of registration has been disclosed to any authorities for use in any criminal proceedings whatsoever. Contrast *Grosso* v. *United States*, 390 U.S. 62, 66.

[13] *Haynes* v. *United States*, 390 U.S. 85, which held that a claim of privilege against self-incrimination provided a complete defense to prosecution, under Section 5851, of individuals required to register firearms under the prior law did not discuss the mental elements involved in such prosecutions.

pears to have been given to a possibility of including a requirement that the possessor must have knowledge of the firearm's unregistered status as a requirement for conviction under the amended section.

When this issue arose in the courts, it was uniformly resolved against such a specific scienter requirement. *United States* v. *Decker*, 292 F. 2d 89, 90 (C.A. 6), certiorari denied, 368 U.S. 834; see also *Sipes* v. *United States*, 321 F. 2d 174 (C.A. 8), certiorari denied, 375 U.S. 913; *Bryan* v. *United States*, 373 F. 2d 403 (C.A. 5). With little discussion, the courts stated simply that "[s]cienter is not involved." *Decker, supra*, at 90. The reference to the term "scienter" in those cases encompassed only knowledge of a firearm's unregistered status; *a fortiori* those cases rejected the proposition adopted by the district court here, that the government must prove specific intent that the weapons be unregistered as well as knowledge that they were in fact unregistered. But as noted in *Sipes, supra*, 321 F. 2d at 179,[15] regardless of what was meant by "scienter," the cases held that the only knowledge required to be proved under Section 5851 was knowledge that the instrument possessed by the defendant was a firearm. See also *United States* v. *Mares*, 208 F. Supp. 550 (D. Colo.), affirmed, 319 F. 2d 71 (C.A. 10); *United States* v. *Fogarty*, 344 F. 2d 475 (C.A. 6); *Taylor* v. *United States*, 333 F. 2d 721 (C.A. 10). Thus, when Section 5861(d) was considered and enacted, judicial construction had made plain that no proof of specific intent with respect to

[15] The ruling in *Sipes* was reaffirmed by the Eighth Circuit after this Court's decision in *Haynes*. *Mower* v. *United States*, 402 F. 2d 982, certiorari denied, 394 U.S. 990.

a firearm's registered status was needed to support a conviction for possession.

In this context, the silence of the legislative history of Section 5861(d) on the issue is eloquent. If the section were intended to add a new element of proof to the offense, the history would have spoken to that fact and, indeed, Congress would almost certainly have shown its purpose by adding appropriate language to the statute. The absence of additional words—the failure to add the word "knowingly" to the new statute—may fairly be characterized as evincing an intent not to change the prior law in this regard.

Instances where Congress requires "knowing" violations of the law are too numerous and well known to require extensive documentation. *E.g.*, 18 U.S.C. 2314; 50 U.S.C. App. 462. And, where appropriate, Congress has explicitly provided from time to time that ignorance of statutes or regulations is a defense to a charge of violating a law containing a requirement of specific knowledge. See, *e.g.*, 15 U.S.C. 79z–3; 15 U.S.C. 80a–48. Indeed, Congress has inserted specific "knowledge" requirements in other portions of this very Act, *e.g.*, 18 U.S.C. (Supp. V) 922 (See Appellees' Memorandum in Support of their Motion to Dismiss, 12). Another subsection of Section 5861 itself, 26 U.S.C. (Supp. V) 5861(l), explicitly requires specific knowledge, making it unlawful "to make, or cause the making of, a false entry on any application, return or record required by this chapter, *knowing such entry to be false*" (emphasis supplied).

In all the circumstances, a specific intent requirement should not be implied here. *Pena-Cabanillas* v.

United States, 394 F. 2d 785, 789 (C.A. 9); cf. *Morissette* v. *United States*, 342 U.S. 246. To be sure, there must be some evidence of mental state—that the accused knew that he possessed a firearm and that he intended to be in possession; in other words, that the possession was "willing and conscious." See *Baender* v. *Barnett*, 255 U.S. 224, 225. But to require more would seriously impede the original Congressional purpose to simplify and clarify the law and to aid in prosecution. H. Rep. No. 481, *supra*. What the ruling of the court below amounts to is a requirement that the government prove that a transferee was aware of the law's requirement that the transfer be approved. Since it is only in rare instances that ignorance of the law is a defense to criminal conduct, there is no reason to attribute to Congress the intent to impose such a requirement here.[18]

B. DUE PROCESS DOES NOT REQUIRE CONSTRUCTION OF THE STATUTE TO MAKE KNOWLEDGE AND INTENT REGARDING A FIREARM'S UNREGISTERED STATUS AN ELEMENT OF THE OFFENSE

This Court stated in *Lambert* v. *California*, 355 U.S. 225, 228, that a "vicious will" is no longer required to constitute a crime in all instances, "for conduct alone

[18] Former Section 5851 contained the following presumption which was made applicable in 1958 to prosecutions for possession of unregistered weapons:

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury.

This language was not retained in Section 5861 of the present statutory system. There is no express indication of the reason for the deletion in the legislative history, although this Court's

without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition." In *Morissette* v. *United States*, 342 U.S. 246, the Court described how the criminal law had progressed from an unyielding requirement that punishment be related to a culpable state of mind to recognition that it is fair, as to certain offenses, to make proof of the proscribed conduct alone sufficient for conviction.[17]

Discussion of statutory modifications of common law *mens rea* requirements is usually couched in terms of what most writers call "absolute" or "strict" criminal

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recent cases involving such presumptions surely played a part. *E.g.*, *United States* v. *Gainey*, 380 U.S. 63. We perceive no reason to infer from the deletion an intent on the part of Congress to increase the requisite knowledge that must be proven to convict for the possessory offense. In light of the government's burden to show proof of possession and lack of registration, the last sentence of Section 5851 was viewed as adding nothing to the government's case, for the defendant would have a right to explain his possession in any event. *United States* v. *Decker*, 292 F. 2d 89 (C.A. 6), certiorari denied, 368 U.S. 834; *Starks* v. *United States*, 316 F. 2d 45 (C.A. 9).

[17] Various terms have been used to describe criminal offenses having the common characteristic of modifying to varying degrees the common law element of *mens rea*—*e.g.* "malum prohibitum" (See Hall, *General Principles of Criminal Law* 337–342 (2d ed. 1960)); "public welfare offenses" (Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933)); "crimes of possession" (Bassiouni, *Criminal Law and its Processes* 72 (1969)); "civil offenses" (Perkins, *Criminal Law* 784–812 (2d ed. 1969)); or, "non-code statutory offenses" (Fox, *Statutory Criminal Law: The Neglected Part*, 52 J. Crim. L.C. & P.S. 392 (1961)).

liability as against the common law *mens rea* concept,[18] which was essentially a requirement that in addition to the active conduct or "actus reus" constituting a crime there must also be a mental element signifying moral blameworthiness. The concept of strict criminal liability is itself subject to differing interpretations, but in essence seems to describe crimes where the mental element is made irrelevant (except, perhaps, in terms of capacity to commit crime), so that a mistake of fact or complete ignorance will not excuse. See Perkins, *Criminal Law* 802–803 (2d ed. 1969); Mueller, *Mens Rea and the Law Without It*, 58 W. Va. L. Rev. 34, 38 (1955). Thus, in *United States* v. *Dotterweich*, 320 U.S. 277, 284, this Court approved of penalizing a corporate officer whose firm shipped adulterated and misbranded drugs in violation of the Food and Drug Act "though consciousness of wrongdoing be totally want-

[18] "* * * [T]his Court has never articulated a general constitutional doctrine of *mens rea*." *Powell* v. *Texas*, 392 U.S. 514, 535. "In general, two closely related but distinguishable notions are involved in the idea of *mens rea*. One is that conduct is criminal only if the actor is aware of the facts making it so. For example, it may be criminal under certain circumstances to possess narcotics. The question arises, does the actor know that the substance that he possesses is a narcotic? If he claims that he does not, will he be allowed to introduce evidence to that effect? If he may not, we have what is commonly described as an offense of strict liability, *i.e.*, one dispensing with *Mens Rea*. The other and rather more difficult notion includes what is sometimes referred to as awareness of wrongdoing. For example, does the possessor of narcotics know there is a legal norm that renders his possession criminal? It is hornbook law that the first of these two notions is usually a limitation on criminality, that the second is not." Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 108.

ing." In *Lambert*, on the other hand, the Court found that a municipality could not punish a person for failure to register his mere presence—"wholly passive" conduct which in itself neither connoted nor brought about any harmful effect. 355 U.S. at 228.

The statute here falls comfortably on middle ground. The conduct it regulates is the possession of hand grenades—highly dangerous offensive weapons. While an individual probably would not think that his mere presence in a city required any act of registration on his part, most individuals would not acquire hand grenades without questioning the legality of possessing them; nor would they be surprised to learn that there is a comprehensive federal statute strictly governing that possession. Failure to make this simple inquiry prior to possession, we submit, imparts a sufficient element of blameworthiness to satisfy even the common law *mens rea* requirement; punishment for possession in these circumstances is eminently justified, particularly when considered in terms of the destructive capabilities of the subject matter. An absolute requirement of government approval prior to knowing and intentional possession of such dangerous instrumentalities frustrates no basic principle of criminal law, nor does it shock traditional concepts of punishment for inexcusable ignorance of the law. See *Lambert, supra*, 355 U.S. at 228; Wasserstrom, *Strict Liability in the Criminal Law*, 12 Stanford L. Rev. 731, 735–736, n. 20 (1960).

Hand grenades are certainly no less dangerous than narcotic drugs nor less fitting subjects of federal regu-

lation. In *United States* v. *Balint*, 258 U.S. 250, 254, a conviction for sale of narcotics not in compliance with federal statutory regulations was affirmed, despite the defendants' claim that they did not know that the drugs were covered by the statute. This Court approved the

> * * * manifest purpose * * * to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. * * *

As in *Balint*, the situation here involves prosecution for active conduct on the part of the wrongdoers in that they took possession without first obtaining permission for that act. That duty is eminently reasonable, given the nature of the subject matter.

We do not contend that appellees would not be allowed to show as a defense at trial that they were unaware that they were in possession of hand grenades, or even that they were unaware of the presence of the box containing the grenades. The thrust of our contention is merely that proof of knowledge of the specific statutory prohibition against receipt or possession of the grenades, or of their unregistered status, is irrelevant to the offense charged. To require such proof under 26 U.S.C. (Supp. V) 5861(d) would have the anomalous result of insulating from conviction only those who fail to pursue the lawful procedures, unless the government could meet the difficult burden of proving knowledge of the registration requirements. The ab-

sence of such a requirement does not violate due process of law.

The conspiracy count of the indictment requires no greater "knowledge" requirement than that detailed for the substantive offense. As appellees point out, "[t]he nub of the problem is that a charge of conspiracy must include an unlawful agreement as to *each element* of the offense." (Reply Memorandum in Support of Motion to Dismiss at 13.) "Offense" in that context can mean no more than the substantive crime which the conspirators agree to commit. Therefore, as in the substantive offense, the key issue is whether knowledge of the unregistered status of the weapons which appellees conspired to possess is essential as an element of the offense charged by 26 U.S.C. (Supp. V) 6861(d). As noted above, that knowledge is not an element.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the indictment ordered reinstated.

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DECEMBER 1970.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 345

UNITED STATES OF AMERICA,
Appellant,

vs.

DONALD FREED and
SHIRLEY JEAN SUTHERLAND,
Appellees.

Appeal from
District Court for the Central
District of California

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On Appeal from the United States District Court for the Central District of California

APPELLEES REPLY BRIEF

Order Below

The district court rendered no opinion; its order granting appellee's motion to dismiss the indictment (App. 43-44) is not reported.

Jurisdiction

The order of the district court was entered on March 10, 1970 (App. 43). The notice of appeal was filed on April 7, 1970 (App. 45), and this Court noted probable juris - diction on October 19, 1970 (App. 47).

Questions Presented

1. Whether 26 U.S.C. 5861(d), 5841(b) and Related Statutes and Regulations compelled Appellees to incriminate themselves?

2. Whether Sections 26 U.S.C. 5861 (d) and 5841 (b) require that the transferee of an unregistered firearm know that it is unregistered when he takes possession?

3. Whether an Indictment under 26 U.S.C. 5861 (d) is defective for failure to allege that Appellees possessed a firearm?

4. Whether a conspiracy to commit an offense under 26 U.S.C. 5861 (d) requires an intent to violate the law?

5. Whether this Court has jurisdiction in a case where the trial judge has considered the merits of the case to some extent dismissing the Indictment and where his ruling is largely based on an interpretation of Government Treasury Regulations?

Statutes Involved

26 U.S.C. (Supp. V) 5812 provides:

(a) Application.

A firearm [1] shall not be transferred

1/ 26 U.S.C. (Supp. V) 5845 defines "firearm" to include, in general, short-barreled guns other than pistols, machine guns, silencers, and destructive devices such as bombs, rockets and grenades.

unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph, business address, etc; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in

violation of the law.

(b) Transfer of possession.

The transferee of the firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

26 U.S.C. (Supp. V) 5841(b) provides:

By whom registered.

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

26 U.S.C. (Supp. V) 5841 (c) provides:

How registered.

Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this

section.

26 U.S.C. (Supp. V) 5861(d) provides:

> It shall be unlawful for any person *** (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record ***

26 U.S.C. Section 179.98

> Application to transfer.
>
> Except as otherwise provided in this subpart, no firearm may be transferred in the United States unless a written application, in duplicate, executed under the penalties of perjury to transfer the firearm and register it to the transferee has been filed with and approved by the Director. The written application shall be filed by the transferor in letter form and shall identify the firearm to be transferred by the classification of the weapon (e.g. machine gun, short-barreled shotgun); serial number; manufacturer and importer, if any; caliber, gauge or size; in the case of a short-barreled shotgun or a short-barreled rifle, the length of the barrel; in the case of a weapon made from a rifle or shotgun, the overall length and the length of the barrel; and any other identifying marks on the firearm. The application shall identify the transferor by name and address; in the case of a special

(occupational) taxpayer under this part, the number of his occupational tax stamp; and if the transferor is other than a natural person, the title or status of the person executing the application. The letter application shall identify the transferee by name and address, and, if the transferee is a natural person not qualified as a manufacturer, importer or dealer under this part, he shall be further identified in the manner prescribed in Section 179.99 of this part and such information attached to the letter application. If the transferee is a qualified special taxpayer under this part, the serial number of his occupational tax stamp shall be shown. Any tax payable on the transfer must be represented by an adhesive stamp of proper denomination being affixed to the letter application, properly canceled. If the transfer is exempt from tax under this part, the application shall include a statement explaining the basis of the exemption.

26 U.S.C. Section 179.99

Identification of Applicant.

If the applicant is an individual, he shall attach to each copy of the application an individual photograph of himself, taken within one year prior to

the date of such application, and shall affix his fingerprints to such application. The fingerprints must be clear for accurate classification and should be taken by someone properly equipped to take them. The application must be supported by a certificate of the local chief of police, sheriff of the county, United States attorney, United States marshal, or such other person whose certificate may in a particular case be acceptable to the Director, Alcohol and Tobacco Tax Division, certifying that he is satisfied that the fingerprints and photograph appearing on the application are those of the applicant and that the firearm is intended by the applicant for lawful purposes.

26 U.S.C. Section 179.100

Action on Application.

The Director will consider a completed and properly executed application to transfer a firearm. If the application is approved, the Director will return the original thereof showing approval to the transferor who may then transfer the firearm to the transferee along with the approved application. The approval of an application for transfer by the Director will effectuate registration of the firearm to the

transferee. The transferee shall not take possession of a firearm until the application for the transfer filed by transferor has been approved by the Director and registration of the firearm is effectuated to the transferee. The transferee shall retain the approved application as proof that the firearm described therein is registered to him. If the application to transfer a firearm is disapproved by the Director, the original application will be returned to the transferor with reasons for disapproval stated on the application. Applications to transfer a firearm shall be denied if the transfer, receipt, or possession of a firearm would place the transferee in violation of law.

Summary of Argument

I. Congressional legislation aimed at curing the defects condemned in the Haynes case was again unsuccessful; for it still maintained the incriminatory network of Revenue Statutes and Treasury Regulations, which although partially introducing the transferor of destructive weapons as a conduit, nevertheless seriously incriminates the transferees of such weapons.

2. Both the Statutes and the Indictment fail to allege an indispensable scienter

requirement, to wit, that appellees took possession of firearms with knowledge that they had not been registered.

3. The Statutes and Indictment neglect to charge that the transferees of firearms had "knowing" possession although the Government concedes that scienter requirement to be an essential ingredient of the crime. The Indictment is not repairable and the Statute is unconstitutional.

4. Count One charges a conspiracy to violate the law governing the acquisition of unregistered weapons. Neither the Statute nor the Indictment alleges the necessary requirement that the Appellees conduct be designed to flout the law.

5. This Tribunal has no jurisdiction inasmuch as the Trial Court decided the case on the merits and his decision depended substantially on an interpretation of Treasury Regulations which conduct does not give rise to Appellate review.

I

APPELLEES TIMELY ASSERTED THEIR OBJECTION THAT COMPLIANCE WITH SECTIONS 5841 (c) AND 5861 (d), TITLE 26, UNITED STATES CODE, NEIGHBORING STATUTES, AND TREASURY REGULATIONS PROMULGATED UNDER THOSE STATUTES REQUIRED THAT THEY INCRIMINATE THEMSELVES CONTRARY TO THE GUARANTEES OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In substance, both counts of the Indictment allege that defendants violated 26 U.S.C. Section 5861 (d) by conspiring to possess, or possessing and aiding and abetting in the possession of destructive devices, to wit, a number of hand grenades, which had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841 (c), Title 26, United States Code. Section 5841 (c) provides:

" * * * * * * * *

(c) How Registered. - Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the regis-

> tration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder, to import, make or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section."
> *

Section 5861 makes it unlawful for any person:

> "* * * * * * * * * *
>
> (d) To receive or possess a firearm which is not registered to him in the National Firearm Registration and Transfer Record [Section 5841(a)];
> * * * * * * * * * * * * * * * * * *"

Both of the above quoted sections of the Code are part of the Gun Control Act of 1968. The Act has as its announced purpose "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence..." The Gun Control Act of 1968 contains within it a number of provisions requiring registration of both firearms and persons in possession of firearms. Section 5841 (a) requires registration of each firearm, complete with identification and address of person entitled

to possession of the firearms. This information must be maintained in a central registry of all firearms, maintained by the Secretary of the Treasury. Subsection (b) requires the transferor of each registered firearm to identify to the Secretary the transferee. Thus, the transferee must reveal his name and address to the transferor whose obligation it is to directly communicate this information to the Secretary of the Treasury. In short, each possessor of a firearm is required by this section of the act to identify himself to the Secretary of the Treasury. Other sections of the Act similarly require a disclosure of those persons in possession of firearms. For example, Section 5812 contains an elaborate scheme for the identification of transferees through an application for a transfer of a firearm. Subsection (b) of Section 5812 prohibits a transferee from taking possession of a firearm unless the Secretary or his delegate have approved the transfer and registration of the firearm to the transferee as required by Subsection (a). Thus, the Act makes it abundantly plain that the possessor of a firearm must reveal this fact to the United States Government.

It is readily apparent that the revelation of possession of firearms [which by definition in the Act includes hand grenades] has a tendency to be incriminatory.

The Act itself is designed to aid in law enforcement and in fighting crime and violence. The legislative history of the Gun Control Act of 1968 emphasizes the need to combat the increasing crime rate, lawlessness and the growing use of firearms in violent crimes. 3 U.S. Cong. and Adm. News (1968), page 4412. The focus of the legislators in creating the new act was plainly upon crime and criminals. Furthermore, it is not difficult to demonstrate the possibilities for self-incrimination under the registration requirements of the law. California, for example, prohibits the possession of destructive devices such as those involved herein, and included in the registration requirement of the Federal Law. Thus, California Penal Code Section 12303 makes it a felony for any person to possess any destructive device (defined in Section 12301 (2) as "any bomb, grenade, missile or similar device or any launching device therefor") punishable by up to three years in State Prison and a fine of $5,000.00.

In Haynes v. United States, 390 U.S. 83 (1968)the United States Supreme Court declared the predecessor to the sections here involved unconstitutional in the light of the Fifth Amendment. Haynes involved a prosecution for possession of a firearm not registered under the Act. The Court first decided that a

prosecution for possession of an unregistered gun was subject to the same constitutional deficiency as was a prosecution for failure to register a firearm. The situation remains unchanged under the new law, which makes both possession and failure to register fundamental ingredients of the offense of possession of an unregistered firearm. The court next ascertained whether the registration requirements reasonably tended to incriminate the registrants. The court concluded that it did, pointing out that the registration requirements were such that they incriminated those who were immediately threatened by criminal prosecution under other sections of the act.

> "They are unmistakenly persons 'inherently suspect of criminal activities'." Haynes v. United States, 390 U.S. 92, 96 (1968).

The court also noted that certain prospective registrants might be threatened by prosecution under State Law. Such persons could also properly raise a claim of Constitutional privilege. (Id. at 390 U.S. 96, Note 11). The court emphasized that:

> "The correlation between obligations to register violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase

> the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of Section 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are 'remote possibilities out of the ordinary course of law,' Heike v. United States, 227 U.S. 131, 144, 33 S. Ct. 226, 228, 57 L. Ed. 450; yet they are compelled on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgment of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable'. Reg. v. Boyes, 1 B. & S. 311, 330; Brown v. Walker, 161 U.S. 591, 599-600, 16 S. Ct. 644, 647-648, 40 L. Ed. 819." (390 U.S. at 96).

The Government contends that the newly amended gun control legislation eliminates the self-incriminatory aspects of the old gun registration requirements. See Haynes v.

United States, 390 U.S. 85 (1968). Basically, the Government contends that under the new act, the gravamen of the offense is "possession" by the transferee of unregistered destructive devices. Since under the new act there is no obligation on the transferee to obtain registration of the destructive device, the Government argues that the requirement that the transferor register possession to the transferee cannot make unregistered possession by the transferee a self-incriminatory act.

Haynes involved the former Section 5851 of the Act. That section made it an offense to possess a firearm which had not been registered as required by Section 5841. Section 5841 placed upon the transferee the obligation to register any firearm which was in his possession and which had not been registered to him. Initially, the court in Haynes rejected the argument that old Section 5851 merely punished "possession" of weapons which had never been registered by anyone. The court specifically found that old Section 5851 prohibited the possession of firearms which had not been registered by the transferee pursuant to the provisions of Section 5841. The court then rejected the argument that old Section 5851 punished "possession" while old Section 5841 punished a failure to register. The court held that a fundamental ingredient

of both offenses was a failure to register.

The court then launched into a two-pronged analysis of the self-incrimination aspect of the statute. The court noted that the obligation to register was conditioned simply upon possession of a firearm. However, not every possessor of a firearm was required to register. Only those who were in possession of firearms made, transferred or imported without compliance with other sections of the act were required to register firearms. Thus, the obligation to register firearms fell upon possessors who were most likely to reveal to the government that they were unlawfully in possession. That is, the obligation to register fell upon those who were threatened by prosecution under other sections of the act. The second aspect of the self-incrimination problem was that it was the transferee, the possessor, who was obligated to reveal the fact of his unlawful possession. Consequently, the Supreme Court found that the registration requirements made the hazards of self-incrimination real and appreciable.

The new sections, under which the defendants in this case are being prosecuted, made certain changes in the law which were designed to avoid the self-incrimination problem recognized in Haynes. The new law requires every destructive device and firearm to be registered in the National Registry

(26 U.S.C.A. Section 5841). This presumably has removed the objection that registration is required of virtually no firearms except those which are illegal, thereby making the threat of self-incrimination on this score "real and appreciable". Furthermore, the burden of registration under the new sections has been removed from the transferee and placed upon the transferor. This, it is argued, has eliminated the self-incrimination aspects from the registration requirement because the transferee is not required to reveal anything directly.

The contention that the new act eliminates the problem of self-incrimination because it does not require only those illegally in possession of weapons to reveal themselves is answered in Haynes. There the Supreme Court stated that if state laws made it illegal to possess certain kinds of weapons, the registration requirements under the federal law would be self-incriminatory. Under those circumstances, an individual required to register could raise the Fifth Amendment question. The California Statutes do prohibit the possession of destructive devices and defendants herein are entitled to raise the question in accordance with Haynes.

The argument that because the transferor must reveal information about the transferee, the transferee is not incriminating himself is not dealt with in Haynes. The

Government points out that the issue was raised but not decided by the Supreme Court in Minor v. United States and its companion case Buie v. United States, 90 S. Ct. 284 (1969). Both cases dealt with the availability of the Fifth Amendment as a defense to convictions for selling narcotics and marijuana without the written order form required by law. In each case the prosecution was against a seller, and the facts involved a sale made to an undercover agent who purchased without an order form. The law required the buyer to have the order form and reveal the seller's name in it. The court stated that it was unlikely that because the buyer was obligated to "inform" on the seller, the seller was thereby incriminating himself, but it did not decide the self-incrimination issue. 1/ However, Minor was decided in the context of a situation which involved illicit dealings on the part of both the buyer and the seller. The Supreme Court therefore concluded that even if the seller wanted to obtain an order form from the buyer, thereby indirectly incriminating himself, it was very unlikely that the buyer would comply with this request.

In the instant case the situation is quite different. The gun control law purports

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1/ Instead, the court decided that no buyer would be willing to obtain a purchase order, thereby freeing the seller to refuse to sell.

to make the transfer of weapons lawful under Federal Law. Presumably the transferor will gladly comply with the registration requirements of the act, if only the transferee will reveal his name, his address, supply fingerprints and all else that the regulations require, which can only be supplied by the purchaser, and which the seller must provide to the authorities. Thus, the buyer is placed in the dilemma presented by Leary v. United States, 395 U.S. 6, as well as Marchetti v. United States, 390 U.S. 39, Grosso v. United States, 390 U.S. 62, and Haynes v. United States, 390 U.S. 85. The buyer is placed in a situation where he can purchase lawfully at his option, if only he will provide information whereby he incriminates himself under state law. The only difference between this and the Leary, Haynes, etc. situations is that the seller has become a "conduit". This is not what the court alluded to, but didn't decide in the Minor case.

The Government vigorously argues that the instant case is distinguishable from Haynes in that the new Section 5861 punishes only "possessio.", and not failure to register. As previously indicated, the Government relies on a series of what it claims are analogous statutes and cases which interpret them in support of its position. It is submitted that the situations are distinguishable and do not

support the Government's position. Although Congress intended to cure the maladies exposed by Haynes, it was unsuccessful.

Furthermore, the congressional attempt to grant immunity from prosecution to a registrant, in order to avoid the effect of the Fifth Amendment privilege, is ineffective. Section 5848, Title 26 U.S.C. provides that:

> "No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence."

The purported immunity granted is too narrow to meet the requirements of the Fifth Amendment. It was obviously the purpose of Congress to prevent only prosecution for that possession involved in the particular act of registration. See 3 U.S. Code Congressional and Administrative News (1968), p.

4435. It is apparent that Congress was concerned only with the possible incrimination for past or present acts. This reads the Fifth Amendment privilege too narrowly. The Supreme Court in Marchetti v. United States, 390 U.S. 39 (1968) discussed this precise question. The Court said:

> "...Its linchpin is plainly the premise that the privilege is entirely inapplicable to prospective acts; for this the Court in Kahriger could vouch as authority only a generalization at 8 Wigmore, Evidence Section 2259c (3d ed. 1940). We see no warrant for so rigorous a constraing upon the constitutional privilege. History, to be sure, offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might appropriately have been made must necessarily have been very infrequent. We are, in any event, bid to view the constitutional commands as 'organic living institutions' whose significance is 'vital not formal'. Gompers v. United States, 233 U.S. 604, 610, 34 S. Ct. 693, 695, 58 L. Ed. 1115.
>
> The central standard for the privilege's application has been

whether the claimant is confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination. (Case authorities omitted) This principle does not permit the rigid chronological distinction adopted in Kahriger and Lewis. For one thing, we see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence. Yet, if the factual situations in which the privilege may be claimed were inflexibly defined by a chronological formula, the policies which the constitutional privilege is intended to serve could easily be evaded. Moreover, although prosecutive acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true. As we shall show, it is not true here. We conclude that it is not mere time to which the law must look, but the substantiality of the risks of incrimination." (390 U.S. at 53, 54).

As the court noted in Marchetti, prospective registrants can reasonably expect

that registration will enhance their prospect for prosecution in the future and facilitate their conviction. One example alone should suffice. One who registers as the possessor of a destructive device may be supplying evidence necessary to show a conspiracy for the possession of destructive devices not only including the registered ones but other destructive devices. Furthermore, the fact of registration may readily be used to prove such elements of an offense as intent and knowledge. Thus, the claims of privilege under the Fifth Amendment relating to the charges here in question are quite broad, and the purported grant of immunity too narrow. In light of defendants' claim of a constitutional privilege, Sections 5841 (c) and 5861 (d) are as unconstitutional to him as were their predecessor sections involved in Haynes.

II

SECTIONS 5841 (c) AND 5861(d) TITLE 26 OF UNITED STATES CODE ARE UNCONSTITUTIONAL ON THEIR FACE AND AS CONSTRUED BY THE INDICTMENT HEREIN AND DEPRIVE DEFENDANTS HEREIN OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IN THAT SAID SECTIONS SEEK TO PUNISH INNOCENT BEHAVIOR WITH GRAVE SANCTIONS.

Neither of the Code Sections here involved nor the Indictment herein include a requirement of unlawful conscious possession knowing that such a device or firearm has not been registered as required by Section 5841(c). Thus under the law and under the indictment here involved innocent possession of an unregistered firearm is made punishable. The punishment for Count Two alone carries a penalty of up to ten years imprisonment and a fine of $10,000.00. * It is submitted that only possession with knowledge of possession and knowledge of the character of the thing possessed may be lawfully punished. This requirement of "knowledge" is not a new one. In

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* Innocent as used here refers to conduct not violative of Federal law. The fact that the State of California punishes such conduct (California Pen. Code Section 12303) is irrelevant.

fact, it is the general rule for criminal statutes rather than the exception.

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil .... Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." ....
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil .... Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be

> criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent", "criminal intent", "malice aforethought", "guilty knowledge", "fraudulent intent", "wilfulness", "scienter", to denote guilty knowledge, or "mens rea", to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes." Morissette v. United States, 342 U.S. 246.

The scienter requirement is most necessary in situations where the accused is required to do nothing, and thus may have the least notice of guilt. It is, for example, an essential element of the crime of possession of stolen property. Similarily, the offense of being an accessory after the fact requires knowledge that a crime has been committed by someone else. This knowledge must be charged and proved, and failure to do

so requires a reversal. Government of Virgin Islands vs. Aquino, 378 F. 2d 540, 554 (3rd Cir. 1967).

The statute and indictment here involved can be constitutionally sound only if they require knowing possession of destructive devices, with knowledge that such devices had not been registered as required. This is peculiarly significant with respect to the registration requirement. Section 5841 (c) places upon the manufacturer, dealer, importer, or transferror the burden of registration. Yet it makes the apparently innocent possessor punishable for failure on the part of the transferor. Thus the mere passive act of possession is severely punishable under the law. The law condemns no act or omission, but denounces inadvertent status, and is unconstitutionally vague. Cf. Lanzetta vs. United States, 306 U.S. 451 (1939). The case of Lambert v. California is instructive here. The Lambert case was concerned with a Los Angeles Municipal Ordinance providing that all persons convicted of felonies who remained in Los Angeles for a period of more than five days register with the police. Failure to register was a misdemeanor. The Appellant in Lambert had been convicted of a felony in a court in Los Angeles. Thereafter she resided in the City of Los Angeles for a period of seven years without registering. Ultimately she was

prosecuted for failure to register. In holding the conviction unconstitutional and a violation of Appellant's right of due process of law the United States Supreme Court said:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865; Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021; Walker v. City of Hutchinson, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178. These cases involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." Lambert v. Cali-

fornia, 355 U.S. 225 (1957).

Although the Government seeks to limit the effect of Lambert to its own peculiar facts, it should not be so limited. For it could easily be claimed that a person who resides in a city should make himself knowledgeable as to the laws governing him. Of course, that type of endeavor as would have been the statutory exploration in this case is fanciful. In the present case, the objection to the failure to allege that the defendants' knew that the firearms were unregistered was not a mistake or ignorance of the law governing activities with firearms; rather, the Government's position, when exposed, is that although the firearms were admittedly unregistered by the Government Agent -- who had an affirmative obligation to do so -- and thus committed a crime -- the transferee is to be regarded as guilty. In other words, it is not ignorance of the law which concerns us here but simply ignorance of the fact that the firearms were unregistered as opposed to ignorance of the law stating that one cannot possess or receive an unregistered forearm. See Williams, Criminal Law p. 411 (1st Ed. 1953). The harsh application of such a statute is especially noxious in a case wherein the Government Agent is the transferor who deliberately flouts the law so as to by virtue

of his crime make those to whom he delivers the firearm equally guilty. The Government then immunizes the agent-transferor and uses him as a witness to prosecute the transferee whose crime is created by the Government Agent.

Initially, it is conceded by the Government that the legislative history underlying the statutes in question is totally silent with respect to whether they require that the transferee of an unregistered firearm have knowledge of its unregistered character. (Appellants Br. p. 22). The Government relies upon the predecessor statutes ruled vulnerable to the Fifth Amendment in the Haynes case, supra, and the decisions interpreting it as indicative of a deliberate policy of Congress to exclude any scienter requirement.

Of course, except in the narrow category of offenses called "public welfare offenses" (Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55 (1933); or "non-code-statutory offenses" (Fox, Statutory Criminal Law: The Neglected Part, 52 J. Crim. L.C. and P.S. 392 (1961) or Malum Prohibitum offenses, the crime must, in addition to the act, contain what has been termed mens rea or a "vicious will". Morissette, supra. Even in the absence of an express reference to mens rea it is presumably part of the crime. See Williams, supra, p. 238.

The cases cited by the Government furnish a good illustration of the domino theory of bad law. In United States v. Wost (N.D. Ohio) 148 F. Supp. 202 (1957), Judge Weick wrote an opinion, devoid of any authority, suggesting that the Federal Firearms Act as it pertained to sawed-off shotguns required no scienter. Then in the most frequently cited case of United States v. Decker (6th Cir. 1961) 292 F. 2d 89, 90, cert. den. 368 U.S. 834, Judge Weick, then a Circuit Court Judge, concluded similarly citing his own Wost opinion and no other authority. Analysis was noticeably missing from both decisions. Decker then spawned a number of decisions citing it and summarily dismissing the scienter argument. It is fair to say that no searching analysis of the scienter requirement under the statute in question or their predecessors was ever undertaken. Perhaps this is as good an occasion as any to examine the appropriate scienter under the new legislation.

It is clear that the Nineteenth and Twentieth Century development of Public Welfare offenses or nuisances requiring no scienter were intended to be merely regulatory or fiscal and involved but light penalties. Sayre, supra, pp. 56, 67, 68. Otherwise, the community outrage would be so vigorous as to nullify their enforcement. ibid 56. Sayre and others have earnestly urged the Courts to

restrict this growing breed of offenses or at least not allow lack of scienter when the penalties are great. Sayre, 70,73, 78-84, Hall, General Principles of Criminal Law, pp. 302-3 (1947); Williams, Criminal Law, 269 (1953). Moreover, the question of scienter is not to be resolved by determining whether the offense is one at common law or of exclusive statutory origin. Sayre, supra, 76. Sayre poses the question of how we determine which offenses warrant the inclusion of mens rea and which do not where the statute involved is entirely silent as to requisite knowledge. He suggests two cardinal principles. If the statute seeks to single out wrongdoers for punishment then mens rea is required. ibid. 72. It has been demonstrated that the past and present purpose of the legislation in question is to do just that. See Argument I, supra. The second criterion depends on the possible penalty. He suggests that imprisonment is too grave to allow deletion of mens rea. ibid. He catalogues the development of "public welfare" offenses, none of which are similar to the statutory scheme before the Court (ibid 73).

It is suggested that consistent with this Court's current thinking that a defendant may be entitled to a jury trial when his potential sentence is more than six months whether he be charged with a "crime" an "offense" or even "contempt" constitutes

a salutary demarcation between statutes wherein "knowledge", "intent" or an "evil will" is required and when it isn't. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477 (1968); Cheff v. Schnackenberg, 384 U.S. 373, 86 S. Ct. 1523 (1966).

Furthermore, the legislation here involved is designed to control crime. Its purpose is neither to encourage crime, nor to cause its commission. Yet, Section 5861(d) interpreted to make it a crime to possess an unregistered destructive device may, it is submitted, cause crime, and may make it more difficult, rather than easier, to prosecute offenses under the section; the section, so interpreted, creates an entrapment as a matter of law in certain situations. A case in point is the instant prosecution. It is alleged that defendants conspired to, and did possess hand grenades not registered to them. The Government admits that its agent procured the devices, and that they were acquired from government sources. Therefore, it was a government agent who transferred the grenades, and it was the same agent who, as transferor, was obligated to perform the registration act. It was he, if anyone, who failed to comply with the law, and thus the crime, if any, originated with the Government Agent, and in

fact, its consumation was at all times in his control. He not only conceived the crime, but participated in its commission, and was the sole means of determining whether or not the crime would be committed. Unless defendants intended to possess unregistered devices, defendants were entrapped as a matter of law. But if the law as interpreted by the Government requires no knowledge with reference to registration, defendants could not know or have an intent to possess the unregistered devices, and only the Government Agent could have originated and compelled commission of the crime. Surely Congress did not intend such a result. And, if it did, Appellees were denied due process of law.

III

THE INDICTMENT IS DEFECTIVE IN THAT IT DOES NOT EVEN ALLEGE THAT THE APPELLEES "KNOWINGLY" POSSESSED A FIREARM.

The indictment fails to allege that the defendants "knowingly" possessed a firearm. (Appendix p. 7). The Government, both in the Court below (ibid 20, 38) and here, has conceded that "

> "(t)o be sure, there must be some evidence of mental state - that the accused knew that he possessed a firearm and that he intended to be in possession; in other words that the possession was 'willing and conscious'." (citing Baender v. Barnett, supra, Appellants Br. pp. 25, 29).

Thus, the Government must admittedly incur a dismissal of the indictment unless its neglect to charge all of the elements of the offense is remediable at this stage. *

Appellees contend that since the indictment does not allege any scienter on their part this omission renders it fatally

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* At no place in the Government's Brief is this argument answered. The prosecution deals solely with the issue of whether scienter encompasses knowledge that the firearms were unregistered.

defective. Since knowledge is an essential element of the crime -- a fact conceded by the Government -- and knowledge is not pleaded, the indictment is void and confers no jurisdiction on the Court to proceed with a trial. Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038 (1962); Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270 (1960); United States v. Caryll, 105 U.S. 611, 612, 26 L. Ed. 1135; Government of Virgin Islands v. Aquino, (3d Cir. 1967) 378 F. 2d 540, 554.

The requirement that an indictment set forth each essential element of the offense arises out of the Constitution.

> "Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury .... This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, both brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused

shall enjoy the right *** to be informed of the nature and cause of the accusation; **** ....

In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet'"

and, secondly,

"'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction'". Russell v. United States (369 U.S. at 60-64, 82 S. Ct. at 1045-47).

Nor may a bill of particulars cure an invalid indictment.

"But it is a settled rule that a bill of particulars cannot save an invalid indictment ....

This underlying principle is reflected by the settled rule in the federal courts that an indictment may

> not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." (ibid. 369 U.S. at 769-70, 82 S. Ct. at 1050).

Consequently to suggest an amendment of the indictment or instructions adding elements to the offense cannot validate an invalid indictment.

In United States v. Carll, supra, followed with approval by this Court in Russell, supra, the Court held that:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; ***"
> 105 U.S. at 612.

In Caryll, as here, the indictment failed to allege scienter though not expressly required by the statute "Hence a charge in the statutory language would not suffice." Russell, supra, 369 U.S. at 787, 82 S. Ct. at 1059 (dissenting opinion).

Thus, the logic of the Government's own position necessitates an affirmation by this Court that the indictment was properly dismissed.

IV 31

COUNT ONE OF THE INDICTMENT - THE CONSPIRACY CHARGE - REQUIRES THAT THE DEFENDANTS JOINTLY INTENDED TO VIOLATE THE LAW.

Although the Government blatantly asserts that the Conspiracy Count (Count One) of the indictment contains "no greater knowledge requirement than that detailed for the substantive offense" (Appellants Br. p. 30) such is clearly not the law. Moreover, the pleading is precisely to the contrary -- presumably in recognition of the distinction between the state of mind essential to proof of a conspiracy to commit a malum prohibitum or public welfare offense and a traditional substantive crime. (Appendix p. 5).

In this case Count One alleges a violation of 18 U.S.C. Section 371 maintaining that the Appellees "wilfully and knowingly combined, conspired, confederated and agreed, together" etc. "to commit an offense against the United States, that is, to possess destructive devices to wit: a number of hand grenades, which hand grenades had not been registered to them with the Secretary of the Treasury or his delegate as required by Section 5841 (c), Title 26 United States Code, in violation of Section 5861 (d), Title 26, United States Code." In other words,

the indictment charges a wilful and knowing conspiracy to violate the law by possessing hand grenades which had not been registered. It was conceded that the Government Agent had not complied with the registration requirements, that the hand grenades were unregistered (Appendix 15-19).

Glanville Williams, the eminent criminal law text writer, tells us that

> "It is regularly held in the United States that conspiracy to do an act that is malum prohibitum not only needs mens rea but needs knowledge of the statutory prohibition, conspiracy being an exception to the rule that ignorance of the law is no excuse.." Williams, Criminal Law, pp. 263, 384 fn. 4 (1st Ed. 1953).

And indeed that is correct. It is axiomatic that in conspiracies to commit public welfare or malum prohibitum offenses there must exist in the mind of the perpetrator the specific intent that his conduct run afoul of the law or knowledge that his behavior is forbidden by law. C.I.T. Corporation v. United States (9th Cir. 1945), 150 F. 2d 85, 93; Pine v. United States, (5th Cir. 1943), 135 F. 2d 353, 357; Landon v. United States (6th Cir. 1924), 299 F. 75, 78; People v. Bowman, 156 Cal. App. 2d 784, 320 P. 2d 70 (1958); People v. Bernhardt, 222 Cal. App. 2d 567, 35 Cal. Rptr.

401 (1963); People v. Marsh, 58 Cal. 2d 732, 26 Cal. Rptr. 300 (1962). People v. Powell, 63 N.Y. 88 (1875); People v. Flack, 125 N.Y. 324, 26 N.E. 267 (1891), 11 L.R.A. 807; Commonwealth v. Gormley, 77 Pa. Super. 298 (1921); Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935) (Hall and Glueck 428); Commonwealth v. Rudnick, 318 Mass. 45, 60 N.E. 353 (Hall, C.L. and P. 564); 38 H.L.R. 96; 62 H.L.R. 281; 89 U. of Pa. L. Rev. 640-2. Perhaps the Landon Court described it best when it asseverated:

> "When ... the prosecution is for conspiracy, the textbooks and the elementary discussions seem to agree that there must be a 'corrupt intent', which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Crim. Law (8th Cir. Ed.); 297, 300."

Many of the decisions cited above deal with grave offenses and highly immoral conduct such as fraud and theft (e.g. Bowman, C.I.T. Corporation) or White Slavery (Pine). Thus it can in no way be contended that the conspiracy to possess unregistered weapons, as in this case, is legally distinguishable from those mentioned above and a plethora of others. Consequently, as to Count One of

the indictment, the specific intent to receive or possess unregistered handgrenades is an indispensable requisite to a valid indictment and subsequent conviction.

V

APPELLEES ASK THAT THE GOVERNMENT'S APPEAL BE DISMISSED IN THAT THE TRIAL JUDGE'S DECISION WAS HYBRID IN NATURE, BASED SUBSTANTIALLY ON FACTUAL CONSIDERATIONS AND VARIOUS TREASURY REGULATIONS AND CONSEQUENTLY NOT REVIEWABLE ON APPEAL.

This Court has often stated that the Government's right to appeal is entirely statutory in origin and is to be strictly construed.

Will v. United States (1967)
389 U.S. 90
88 S. Ct. 269

United States v. Mersky (1960)
361 U.S. 431
80 S.Ct. 459

Di Bella v.United States, Fla.-N.Y. 1962
369 U.S. 121
82 S. Ct. 654

Government appeals are unusual, exceptional, and not favored.

United States v. Borden Co. (1939)
308 U.S. 188, 192
60 S. Ct. 182

United States v. Apex Distributing Co. (9th Cir. 1959)
270 F. 2d 747

In the instant case the decision of the trial judge to terminate the proceedings was based

upon a number of coalescing considerations.

In the first place, more than the sterile indictment was before the Court. There was data obtained pursuant to a Bill of Particulars which revealed that the police agent in question purchased hand grenades from a Long Beach Naval Arsenal and violated the selfsame law he sought to convict the defendants of infringing by failing to register the grenades. Moreover, it was concluded that the crime was capable of commission only by this act of dereliction by the police agent since there is no federal crime to possess hand grenades, although there is a state statute covering the subject. (California Penal Code Section 12303). The Court's reasoning is replete with notions that the Government may not profit from its own wrongdoing, or participate in a violation of the same law sought to be leveled against Appellees. Although the formal result was a dismissal of the indictment that characterization is not controlling.

United States v. Thompson (1920)
251 U.S. 407
40 S. Ct. 289

What in effect was done here was to evaluate the conduct of the police agent vis a vis the defendants and dismiss the case. Accordingly a decision on the facts was reached and the case is not ripe for review. See United States v. Sissin, 90 S. Ct. 1117 (1970).

A second reason that the appeal is not authorized springs from the fact that the trial court's determination was not simply based on an interpretation of a statute but rather also included an interpretation of treasury regulations. (See e.g. Transcript of Proceedings of February 16, 1970 at pp. 9-10). For the proposition that a decision which construes regulations as opposed to a "statute" is not appealable we rely on the dissenting opinions in United States v. Mersky (1960), 361 U.S. 431, 80 S. Ct. 459.

CONCLUSION

For the aforegoing reasons the decision of the Trial Court should be upheld and the case dismissed.

Respectfully submitted,

Luke McKissack

LUKE McKISSACK
Attorney for Appellees,
Freed and Sutherland

No. 345

Motion for leave to file petition for rehearing.
(not printed)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* FREED ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 345. Argued January 11, 1971—Decided April 5, 1971

In *Haynes* v. *United States*, 390 U. S. 85, the Court held invalid under the Self-Incrimination Clause of the Fifth Amendment provisions of the National Firearms Act which constituted parts of an interrelated statutory scheme for taxing certain classes of firearms primarily used for unlawful purposes and made the potentially incriminating information available to state and other officials. To eliminate the defects revealed by *Haynes*, Congress amended the Act so that only a possessor who lawfully makes, manufactures, or imports firearms can and must register them. The transferor must identify himself, describe the firearm, and give the name and address of the transferee, whose application must be supported by fingerprints and a photograph and a law enforcement official's certificate identifying them as those of the transferee and stating that the weapon is intended for lawful uses. Only after the transferor's receipt of the approved application form may the firearm transfer be legally made. A transferee does not and cannot register, though possession of an unregistered firearm is illegal. No information or evidence furnished under the Act can be used as evidence against a registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence," and no information filed is, as a matter of administration, disclosed to other federal, local, or state agencies. Appellees, who had been indicted under the amended Act for possessing and conspiring to possess unregistered hand grenades, filed motions to dismiss, which the District Court granted on the ground that the amended Act, like its predecessor, compels self-incrimination and that the indictment contravenes due process requirements by failing to allege scienter.

Syllabus

Appellees also contend that the provisions relating to fingerprints and photographs will cause future incrimination. *Held:*

1. The revised statutory scheme of the amended Act, which significantly alters the scheme presented in *Haynes*, does not involve any violation of the Self-Incrimination Clause of the Fifth Amendment. Pp. 3–5.

2. The amended Act fully protects a person against incrimination for past or present violations, and creates no substantial hazards of future incrimination. P. 5.

3. The amended Act's prohibition against a person's "receiv[ing] or possess[ing] a firearm which is not registered to him," requires no specific intent and the absence of such a requirement in this essentially regulatory statute in the area of public safety does not violate due process requirements either as respects the substantive count or the conspiracy count. Pp. 5–8.

Reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN (as to Part I), STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 345.—October Term, 1970

United States, Appellant, v. Donald Freed and Shirley Jean Sutherland. | On Appeal From the United States District Court for the Central District of California.

[April 5, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

Following our decision in *Haynes* v. *United States*, 390 U. S. 85, Congress revised the National Firearms Act with the view of eliminating the defects in it which were revealed in *Haynes*.[1]

At the time of *Haynes* "only weapons used principally by persons engaged in unlawful activities would be subjected to taxation." *Id.*, at 87. Under the Act, as amended, all possessors of firearms as defined in the Act[2] are covered, except the Federal Government. 26 U. S. C. Supp. V § 5841.

At the time of *Haynes* any possessor of a weapon included in the Act was compelled to disclose the fact of his possession by registration at any time he had acquired possession, a provision which we held meant that a possessor must furnish potentially incriminating information which the Federal Government made available to state, local, and other federal officials. *Id.*, at 95–100.

[1] See S. Rep. No. 1501, 90th Cong., 2d Sess. 26, 42, 48, 52; H. Rep. No. 1956, 90th Cong., 2d Sess. 35.

[2] 26 U. S. C. § 5845 (f) defines "destructive device" to include "grenades" which are involved in the present case.

Under the present Act[3] only possessors who lawfully make, manufacture, or import firearms can and must register them; *the transferee does not and cannot register.* It is, however, unlawful for any person "to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."[4]

At the time of *Haynes*, as already noted, there was a provision for sharing the registration and transfer information with other law enforcement officials. *Id.*, at 97–100. The revised statute explicitly states that no infor-

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[3] Section 26 U. S. C. § 5812 (a) provides:

"A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may be regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."

Section 26 U. S. C. § 5812 (b) provides:

"The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section."

Section 26 U. S. C. § 5841 (b) provides:

"Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor."

[4] 26 U. S. C. § 5861 (d).

mation or evidence provided in compliance with the registration or transfer provisions of the Act can be used, directly or indirectly, as evidence against the registrant or applicant "in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence." [5] The scope of the privilege extends, of course, to the hazards of prosecution under state law for the same or similar offenses. See *Malloy* v. *Hogan*, 378 U. S. 1; *Marchetti* v. *United States*, 390 U. S. 39, 54. And the appellees, apparently fearful that the Act as written does not undertake to bar the use of federal filings in state prosecutions, urges that those risks are real in this case. It is said that California statutes [6] punish the possession of grenades and that federal registration will incriminate appellees under that law.

The Solicitor General, however, represents to us that *no information filed* is as a matter of practice disclosed to any law enforcement authority, except as the fact of nonregistration may be necessary to an investigation or prosecution under the present Act.

The District Court nonetheless granted the motion to dismiss on two grounds (1) the amended Act, like *Haynes*, violates the Self-Incrimination Clause of the Fifth Amendment; and (2) the conspiracy "to possess destructive devices" and the possession charged do not allege the element of scienter. The case is here on direct appeal. 18 U. S. C. § 3731. And see *United States* v. *Spector*, 343 U. S. 169; *United States* v. *Nardello*, 393 U. S. 286.

I

We conclude that the amended Act does not violate the Self-Incrimination Clause of the Fifth Amendment

[5] 26 U. S. C. § 5848; and see 26 CFR § 179.202.

[6] Penal Code § 12303.

which provides that no person "shall be compelled in any criminal case to be a witness against himself." As noted, a lawful transfer of a firearm may be accomplished only if it is already registered. The transferor—not the transferee—does the registering. The transferor pays the transfer tax and receives a stamp [7] denoting payment which he affixes to the application submitted to the Internal Revenue Service. The transferor must identify himself, describe the firearm to be transferred, and the name and address of the transferee. In addition, the application must be supported by the photograph and fingerprints of the transferee and by a certificate of a local or federal law enforcement official that he is satisfied that the photograph and fingerprints are those of the transferee and that the weapon is intended for lawful uses.[8] Only after receipt of the approved application form is it lawful for the transferor to hand the firearm over to the transferee. At that time he is to give the approved application to the transferee.[9] As noted, the Solicitor General advises us that the information in the hands of Internal Revenue Service, as a matter of practice, is not available to state or other federal authorities and, as a matter of law, cannot be used as evidence in a criminal proceeding with respect to a prior or concurrent violation of law.[10]

The transferor—not the transferee—makes any incriminating statements. True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the lawful, not the unlawful, pos-

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[7] 26 U. S. C. § 5811.
[8] 28 U. S. C. § 5812 (a); 26 CFR §§ 179.98–179.99.
[9] 26 CFR § 179.100.
[10] 26 U. S. C. § 5848; 26 CFR § 179.202.

sessor of the firearm. Indeed the only transferees who may lawfully receive a firearm are those who have not committed crimes in the past. The argument, however, is that furnishing the photograph and fingerprints will incriminate the transferee in the future. But the claimant is not confronted by "substantial and 'real' " but merely "trifling or imaginary hazards of incrimination"—*first* by reason of the statutory barrier against use in a prosecution for prior or concurrent offenses, and *second* by reason of the unavailability of the registration data, as a matter of administration, to local, state, and other federal agencies. *Marchetti* v. *United States, supra,* 53–54. Cf. *Minor* v. *United States,* 396 U. S. 87, 94. Since the states and other federal agencies never see the information, he is left in the same position as if he had not given it, "but had claimed his privilege in the absence of a . . . grant of immunity." *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 79. This, combined with the protection against use to prove prior or concurrent offenses satisfies the Fifth Amendment requirements respecting self-incrimination.[11]

Respondent's argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

Another argument goes to the question of entrapment. But that is an issue for the trial, not for a motion to dismiss.

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[11] We do not reach the question of "use immunity" as opposed to "transactional immunity," cf. *Piccirillo* v. *New York,* 400 U. S. 548, but only hold that, under this statutory scheme, the hazards of self-incrimination are not real.

II

We also conclude that the District Court erred in dismissing the indictment for absence of an allegation of scienter.

The Act requires no specific intent or knowledge that the hand grenades were unregistered. It makes it unlawful for any person "to receive or possess a firearm which is not registered to him." [12] By the lower court decisions at the time that requirement was written into the Act the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. See *Sipes* v. *United States*, 321 F. 2d 174, 179, and cases cited.

The presence of a "vicious will" or *mens rea* (*Morissette* v. *United States*, 342 U. S. 246, 251) was long a requirement of criminal responsibility. But the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare. *Id.*, at 254. The statutory offense of embezzlement, borrowed from the common-law where scienter was historically required, was in a different category.[13] *Id.*, at 260–261.

> ". . . where Congress borrows terms of art in which are accumulated the legal tradition and mean-

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[12] 26 U. S. C. § 5861 (d).

[13] As respects the *Morissette* case, Marshall, *Intention-In Law and Society* (1968), p. 138, says:

"The defendant wished to take government property from a government bombing range, he had the capacity to take it, he had the opportunity, he tried and succeeded in taking it (his wish was fulfilled, his act accomplished). For recovery in a tort action no more would have to be shown to establish liability, but the court held that to make his action criminal 'a felonious intent,' *mens rea*, had to be established. This could not be presumed from his actions, which were open, without concealment, and in the belief—according to his statement—that the property had been abandoned. In other words, for the happening to be criminal, the wish had to be to ac-

> ing of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.*, at 263.

At the other extreme is *Lambert* v. *California*, 355 U. S. 225, in which a municipal code made it a crime to remain in Los Angeles for more than five days without registering if a person had been convicted of a felony. Being in Los Angeles is not *per se* blameworthy. The mere failure to register, we held, was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." *Id.*, at 228. The fact that the ordinance was a convenient law enforcement technique did not save it.

> "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." *Id.*, 229–230.

In *United States* v. *Dotterweich*, 320 U. S. 277, 284, a case dealing with the imposition of a penalty on a corporate officer whose firm shipped adulterated and misbranded drugs in violation of the Food and Drug Act, we approved the penalty "though consciousness of wrongdoing be totally wanting."

The present case is in the category neither of *Lambert* nor *Morissette*, but is closer to *Dotterweich*. This is a

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complish something criminal. So in discussing intent we may have wishes of two different characters: one giving a basis for civil liability (the wish to take property not one's own), and another which would support criminal liability as well as civil (taking property with criminal intent)."

regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act.[14] They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States* v. *Balint*, 258 U. S. 250, 254, where a defendant was convicted of sale of narcotics against his claim that he did not know the drugs were covered by a federal act. We say with Chief Justice Taft in that case:

> "It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.*, at 253–254.

Reversed.

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[14] We need not decide whether a criminal conspiracy to do an act "innocent in itself" and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy. Cf. *United States* v. *Mack*, 112 F. 2d 290.

SUPREME COURT OF THE UNITED STATES

No. 345.—October Term, 1970

United States, Appellant, *v.* Donald Freed and Shirley Jean Sutherland.	On Appeal From the United States District Court for the Central District of California.

[April 5, 1971]

Mr. Justice Brennan, concurring in the judgment of reversal.

I agree that the Amendments to the National Firearms Act, 26 U. S. C. §§ 5841–5872 (Supp. V, 1970), do not violate the Fifth Amendment's privilege against self-incrimination, and join Part I of the opinion of the Court. However, I do not join Part II of the opinion; although I reach the same result as the Court on the intent the Government must prove to convict, I do so by another route.

I join Part I on my understanding of the Act's new immunity provision. 26 U. S. C. § 5848 (Supp. V, 1970). The amended registration provisions of the National Firearms Act do not pose any realistic possibility of self-incrimination of the transferee under federal law. An effective registration of a covered firearm will render the transferee's possession of that firearm legal under federal law. It is only appellees' contention that registration or application for registration will incriminate them under California law that raises the Fifth Amendment issue in this case. Specifically, appellees assert that California law outlaws possession of hand grenades and that registration under federal law would, therefore, incriminate them under state law. Assuming that appellees correctly interpret California law, I think that the Act's immunity provision suffices to supplant the

constitutional protection. Section 5848 provides in pertinent part:

> "No information or evidence obtained from an application . . . shall . . . be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application . . . ."

In my judgment, this provision would prevent a State from making any use of a federal registration or application, or any fruits thereof, in connection with a prosecution under the State's possession law.[1] This would be true even if the State charged a transferee with possession of the firearm on a date after the date the application was filed, because possession is a continuing violation.[2] Therefore, for purposes of the State's possession law, a transferee's continued possession of a registered firearm would constitute "a violation of law occurring . . . concurrently with the filing of the application."

I agree with the Court that the Self-Incrimination Clause of the Fifth Amendment does not require that immunity be given as to the use of such information in connection with crimes which the transferee might possibly commit in the future with the registered firearm. The only disclosure required under the amended Act is that the transferee has received a firearm and is in possession of it. Thus, in connection with the present general registration scheme, "the relevant class of activities 'perme-

[1] No question of transactional immunity is raised here since the case inivolves incrimination under the laws of a jurisdiction different from the one compelling the incriminating information. *Piccirillo* v. *New York*, — U. S. —, — (BRENNAN, J., dissenting).

[2] The result would be the same if a transferee moved from a State where possession was legal to a State where possession was illegal. The time when the possession became illegal cannot affect the continuing nature of the act of possession.

ated with criminal statutes,'" *Mackey* v. *United States*, — U. S. —, — (1971) (BRENNAN, J., concurring), is limited to the class of activities relating to possession of firearms. *Id.*, at ———. Since I read the statute's immunity provision to provide immunity coextensive with the privilege in that regard, I find no Fifth Amendment bar to the enforcement of the federal statute.

The Court's discussion of the intent the Government must prove to convict appellees of violation of 26 U. S. C. § 5861 (d) does not dispel the confusion surrounding a difficult, but vitally important area of the law. This case does not raise questions of "consciousness of wrongdoing" or "blameworthiness." If the ancient maxim that "ignorance of the law is no excuse" has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy. Nor is it possible to decide this case by a simple process of classifying the statute involved as a "regulatory" or a "public welfare" measure. To convict appellees of possession of unregistered hand grenades, the Government must prove three material elements: (1) that appellants possessed certain items; (2) that the items possessed were hand grenades; and (3) that the hand grenades were not registered. The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades. Thus, while the Court does hold that no intent at all need be proved in regard to one element of the offense—the unregistered status of the grenades—knowledge must still be proved as to the other two elements. Consequently, the National Firearms Act does not create a crime of strict liability as to all its elements. It is no help in deciding what level of intent must be proved as

to the third element to declare that the offense falls within the "regulatory" category.

Following the analysis of the Model Penal Code,[3] I think we must recognize, first, that "[t]he existence of *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U. S. 494, 500 (1951) (Vinson, C. J., announcing judgment); *Smith* v. *California*, 361 U. S. 147, 150 (1959);[4] second, that *mens rea* is not a unitary concept, but may vary as to each element of a crime; and third, that Anglo-American law has developed several identifiable and analytically distinct levels of intent, *e. g.*, negligence, recklessness, knowledge, and purpose.[5] To determine the mental element required for conviction, each material element of the offense must be examined and the determination made what

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[3] American Law Institute, Model Penal Code § 2.02, Comment, pp. 123–132 (Tent. Draft No. 4, 1955).

[4] "Still, it is doubtless competent for the [government] to create strict criminal liabilities by defining criminal offenses without any element of scienter—though . . . there is precedent in this Court that this power is not without limitations. See *Lambert* v. *California*, 355 U. S. 225." *Smith* v. *California*, 361 U. S. 147, 150 (1959). The situations in which strict liability may be imposed were stated by Judge, now Mr. Justice, BLACKMUN: "[W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent." *Holdridge* v. *United States*, 282 F. 2d 302, 310 (CA8 1960).

[5] These different levels of intent are defined in the code. A. L. I., Model Penal Code § 2.02 (Prop. Off. Draft 1962). This Court has relied on the code's definitions. *Leary* v. *United States*, 395 U. S. 6, 46 n. 93 (1969); *Turner* v. *United States*, 396 U. S. 398, 416 n. 29 (1970).

level of intent Congress intended the Government to prove, taking into account constitutional considerations, see *Screws* v. *United States*, 325 U. S. 91 (1945), as well as the common-law background, if any, of the crime involved. See *Morrisette* v. *United States*, 342 U. S. 246 (1952).

Although the legislative history of the Amendments to the National Firearms Act is silent on the level of intent to be proved in connection with each element of the offense, we are not without some guideposts. I begin with the proposition stated in *Morrisette* v. *United States*, 342 U. S., at 250, that the requirement of *mens rea* "is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." In regard to the first two elements of the offense, (1) possession of items that (2) are hand grenades, the general rule in favor of some intent requirement finds confirmation in the case law under the provisions replaced by the present amendments. Those cases held that a conviction of an individual for illegal possession of unregistered firearms had to be supported by proof that his possession was "willing and conscious" and that he knew the items possessed were firearms. *E. g.*, *Sipes* v. *United States*, 321 F. 2d 174, 179 (CA8 1963); *United States* v. *Decker*, 292 F. 2d 89 (CA6 1961). Congress did not disapprove these cases, and we may therefore properly infer that Congress meant that the Government must prove knowledge with regard to the first two elements of the offense under the amended statute.

The third element—the unregistered status of the grenades—presents more difficulty. Proof of intent with regard to this element would require the Government to show that the appellees knew that the grenades were

unregistered or negligently or recklessly failed to ascertain whether the weapons were registered. It is true that such a requirement would involve knowledge of law, but it does *not* involve "consciousness of wrong-doing" in the sense of knowledge that one's actions were prohibited or illegal.[6] Rather, the definition of the crime, as written by Congress, requires proof of circumstances which involve a legal element, namely whether the grenades were registered in accordance with federal law. The knowledge involved is solely knowledge of the circumstances which the law has defined as material to the offense. The Model Penal Code illustrates the distinction:

> "It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because knowledge that the property belongs to someone else is a material element of the crime and such knowledge may involve matter of law as well as fact . . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that

[6] Proof of some crimes may include a requirement of proof of actual knowledge that the act was prohibited by law, or proof of a purpose to bring about the forbidden result. See *James* v. *United States*, 366 U. S. 213 (1961); *Boyce Motor Lines* v. *United States*, 342 U. S. 337 (1952). *United States* v. *Murdock*, 290 U. S. 389 (1933). See generally Note, Counseling Draft Resistance: The Case for a Good-Faith Belief Defense, 78 Yale L. J. 1008, 1022–1037 (1969). Cf. Model Penal Code § 2.02 (2)(a) (Prop. Off. Draft 1962) (definition of "purposely").

are material to the offense." Model Penal Code § 2.02, Comment, p. 131 (Tent. Draft No. 4, 1955).

Therefore, as with the first two elements, the question is solely one of congressional intent. And while the question is not an easy one, two factors persuade me that proof of *mens rea* as to the unregistered status of the grenades is not required. First, as the Court notes, the case law under the provisions replaced by the current law dispensed with proof of intent in connection with this element. *Sipes* v. *United States, supra.* Second, the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large calibre weapons including mortars, antitank guns, and bazookas. Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. In the context of a taxing and registration scheme, I therefore think it reasonable to conclude that Congress dispensed with the requirement of intent in regard to the unregistered status of the weapon, as necessary to effective administration of the statute.